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Supreme Court of the United States

October Term, 1976

No. 76-893

Samuel H. Sloan d/b/a Samuel H. Sloan & Co.,

Appellant,

-against-

Shearson, Hammill & Co., Inc.,

Appellee.

JURISDICTIONAL STATEMENT

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IN THE
SUPREME COURT OF THE UNITED STATES

SAMUEL H. SLOAN d/b/a SAMUEL H. SLOAN & CO.,
Appellant.

-against-

SHEARSON, HAMMILL & CO., INC.,
Appellee.

JURISDICTIONAL STATEMENT

This is an appeal from an order of the State of New York Court of Appeals dated September 21, 1976, which dismissed an appeal with the statement that no substantial constitutional question is directly involved in the appeal, *Shearson, Hammill & Co., Inc. v. Sloan,* 40 N.Y. 2d 844, 846 (1976) and from the orders of the New York State Supreme Court, Appellate Division, First Department dated July 3, 1975 and September 11, 1975 which affirmed the default judgment of the New York State Supreme Court, New York County (Quinn, J.) and which denied a motion for reargument and for disqualification of one of the judges who participated in the appeal.

OPINIONS BELOW

There have been no reported opinions in this case. The order of the State of New York Court of Appeals dated September 21, 1976 which dismissed the appeal is reported as *Shearson, Hammill & Co., Inc. v. Sloan,* 40 N.Y. 2d 844, 846 (1976). See also 387 N.Y.S. 2d No. 8 p. CXIV (advance sheet). This order is included as Appendix OO to this jurisdictional statement. The order of the New York State Supreme Court, Appellate Division, First Department dated July 3, 1975 which affirmed the default

judgment of the New York State Supreme Court, New York County (Quinn, J.) is reported as *Shearson, Hammill & Co., Inc., v. Sloan*, 49 A.D. 2d 521, 373 N.Y.S. 2d 849 (1975). This order is included as Appendix FF to this jurisdictional statement. The order of the New York State Supreme Court, Appellate Division, First Department which denied a request for reconsideration on the grounds that one of the judges who participated in the decision of the appeal to that court was disqualified by virtue of the fact that he denied a motion to vacate the order of attachment when the case was pending in the New York State Supreme Court, New York County is unreported and is included as Appendix II to this jurisdictional statement.

There were numerous decisions and orders entered by various judges when this case was pending before the New York State Supreme Court, New York County. None of these have been officially reported. They are included as Appendices B, E, J, K, L, M, N, O, Q, R, S, T, U, V, AA, BB and DD to this jurisdictional statement.

JURISDICTION

The appellate jurisdiction of this Court is invoked under 28 U.S.C. §1257(2) and Rule 10 of the Supreme Court Rules inasmuch as the State of New York Court of Appeals has decided in this case the question of the constitutional validity of the New York State attachment statute, Article 62 of the New York Civil Practice Law and Rules, and the decision is in favor of its validity.

The decision of the State of New York Court of Appeals which dismissed the appeal with the statement that no substantial constitutional question is directly involved in this appeal was entered on September 21, 1976. A notice of appeal was served on October 20, 1976 within the time allowed by law and was timely filed with the clerk of the

New York State Supreme Court, New York County.[1] The time within which to file this jurisdictional statement is 90 days from September 21, 1976 as provided in Rule 13(1) of the Supreme Court Rules.

QUESTIONS PRESENTED

1. Is the New York State attachment statute, Article 62 of the New York Civil Practice Law and Rules, unconstitutional?

2. Was the appellant deprived of his due process rights by the entry of a default judgment in this action and by the failure of the New York State Supreme Court, New York County to open the default where counsel for the appellee failed to give notice and to serve the appellant with a copy of the petition to confirm the decision of the New York Stock Exchange arbitrators?

3. Does the New York State Supreme Court have subject matter jurisdiction over this action which is a controversy between two broker dealers registered with the Securities & Exchange Commission involving a securities contract and delivery, where both sides have accused each other of violations of the Securities Exchange Act of 1934, and where the appellant is entitled to arbitration of this dispute as a matter of right before the New York Stock Exchange in accordance with Section 6 of the Securities Exchange Act of 1934, 15 U.S.C. §78f, and Article III Section 1 of the New York Stock Exchange Constitution and rules promulgated thereunder, inasmuch as Section 27

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1. Since counsel for the plaintiff-appellee has yet to serve upon the defendant-appellant a copy of the September 21, 1976 order of the State of New York Court of Appeals, the time under CPLR §5513(a) within which the defendant-appellant must serve the notice of appeal has not yet begun to run.

of the Securities Exchange Act of 1934, 15 U.S.C. §78aa, states that the United States district courts have exclusive jurisdiction over suits brought to enforce any liability or duty created by the Securities Exchange Act of 1934 or the rules and regulations thereunder?

4. Does New York State Supreme Court have jurisdiction to enter a judgment based upon a decision by New York Stock Exchange arbitrators?

5. Assuming it has jurisdiction to do so, did the New York State Supreme Court deprive the defendant-appellant of his due process rights by denying without a hearing the motion of defendant-appellant to vacate or modify the decision by the New York Stock Exchange arbitrators?

6. Did the entry of the default judgment in this action deprive the defendant-appellant of his due process rights in that a New York State procedural rule set forth in *McNulty v. Solley*, 95 N.Y. 242 (1884) and embodied in Section 3211(a)(5) of the New York Civil Practice Law and Rules requires the dismissal of this action?

7. Was the defendant-appellant deprived of his constitutional due process rights when the same judge who denied the initial motion to vacate the order of attachment in the New York State Supreme Court, New York County later sat on the panel of the Appellate Division, First Department and reviewed his own order on appeal?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment, in pertinent part, states:

> ". . . nor shall any state deprive any person of life, liberty or property without due process of law . . ."

Article 4, Section 403 of the New York Civil Practice Law and Rules, states:

> (a) Notice of petition. A notice of petition shall specify the time and place of the hearing on the petition and the supporting affidavits, if any, accompanying the petition.
>
> (b) Time for service of notice of petition and answer. A notice of petition, together with the petition and affidavits specified in the notice, shall be served on any adverse party at least eight days before the time at which the petition is noticed to be heard. An answer and supporting affidavits, if any, shall be served at least one day before such time. A reply, together with supporting affidavits, if any, shall be served at or before such time. An answer shall be served at least five days before such time if a notice of petition served at least ten days before such time so demands; whereupon any reply shall be served at least one day before such time.
>
> (c) Manner of service. A notice of petition shall be served in the same manner as a summons in an action.
>
> (d) Order to show cause. The court may grant an order to show cause to be served, in lieu of a notice of petition at a time and in a manner specified therein.

Article 32, Section 3211(a)(5) of the New York Civil Practice Law and Rules, in pertinent part, provides:

> "(a) Motion to dismiss cause of action. A party may move for judgment dismissing one or more causes of action against him on the ground that:
>
> ***
>
> 5. The cause of action may not be maintained because of arbitration and award . . ."

Article 55, Section 5501(a)(1) of the New York Civil Practice Law and Rules states:

> "An appeal from a final judgment brings up for review:

1. any non-final judgment or order which necessarily affects the final judgment, including any which was adverse to the respondent on the appeal from the final judgment and which, if reversed, would entitle the respondent to prevail in whole or in part on that appeal, provided that such non-final judgment or order has not previously been reviewed by the court to which the appeal is taken."

Article 56, Section 5601(a) & (b) of the New York Civil Practice Law and Rules provides:

(a) Dissent, reversal or modification. An appeal may be taken to the court of appeals as of right in an action originating in the supreme court, a county court, a surrogate's court, the family court, the court of claims or an administrative agency, from an order of the appellate division which finally determines the action, where (i) there is a dissent on a question of law in favor of the party taking such appeal, or (ii) such order directs a reversal of the judgment or order appealed from, or (iii) such order directs a modification thereof in a substantial respect, which is within the power of the court of appeals to review on such appeal, and the party taking the appeal is aggrieved by the modification.

(b) Constitutional grounds. An appeal may be taken to the court of appeals as of right:

1. from an order of the appellate division which finally determines an action where there is directly involved the construction of the constitution of the state or of the United States; and

2. from a judgment of a court of record of original instance which finally determines an action where the only question involved on the appeal is the validity of a statutory provision of the

state or of the United States under the constitution of the state or of the United States.

Article 62, Section 6201 of the New York Civil Practice Law and Rules provides:

An order of attachment may be granted in any action, except a matrimonial action, where the plaintiff has demanded and would be entitled, in whole or in part, or in the alternative, to a money judgment against one or more defendants, when:

1. the defendant is a foreign corporation or not a resident or domiciliary of the state; or

2. the defendant resides or is domiciled in the state and cannot be personally served despite diligent efforts to do so; or

3. the defendant, with intent to defraud his creditors or to avoid the service of summons, has departed or is about to depart from the state, or keeps himself concealed therein; or

4. the defendant, with intent to defraud his creditors, has assigned, disposed of or secreted property, or removed it from the state or is about to do any of these acts; or

5. the defendant, in an action upon a contract, express or implied, has been guilty of a fraud in contracting or incurring the liability; or

6. the action is based upon the wrongful receipt, conversion or retention, or the aiding or abetting thereof, of any property held or owned by any governmental agency, including a municipal or public corporation, or officer thereof; or

7. the cause of action is based on a judgment, decree or order of a court of the United States or of any other court which is entitled to full faith and credit in this state, or on a judgment which qualifies for recognition under the provisions of article 53: or

8. there is a cause of action to recover damages for the conversion of personal property, or for fraud or deceit.

Article 62, Section 6212 of the New York Civil Practice Law and Rules, provides:

(a) Affidavit; other papers. On a motion for an order of attachment the plaintiff shall show, by affidavit and such other written evidence as may be submitted, that there is a cause of action and the one or more grounds for attachment provided in section 6203 that exist and the amount demanded from the defendant above all counterclaims known to the plaintiff.

(b) Undertaking. On a motion for an order of attachment, the plaintiff shall give an under taking, in a total amount fixed by the court, but not less than two hundred fifty dollars, a specified part thereof conditioned that the plaintiff shall pay to the defendant all legal costs and damages which may be sustained by reason of the attachment if the defendant recovers judgment or if it is finally decided that the plaintiff was not entitled to an attachment of the defendant's property, and the balance conditioned that the plaintiff shall pay to the sheriff all of his allowable fees. The attorney for the plaintiff shall not be liable to the sheriff for such fees.

(c) Filing. Within ten days after the granting of an order of attachment, the plaintiff shall file it and the affidavit and other papers upon which it was based and the summons and complaint in the action. Unless the time for filing has been extended, the order shall be invalid if not so filed, except that a person upon whom it is served shall not be liable for acting upon it as if it were valid without knowledge of the invalidity.

(d) Demand for papers. At any time after property has been levied upon, the defendant may

serve upon the plaintiff a written demand that the papers upon which the order of attachment was granted and the levy made be served upon him. Not more than one day after service of the demand, the plaintiff shall cause the papers demanded to be served at the address specified in the demand. A demand under this subdivision shall not of itself constitute an appearance in the action.

Article 80, Section 8012(b) of the New York Civil Practice Law and Rules, in pertinent part, provides:

"POUNDAGE FEES.

1. A sheriff is entitled, for collecting money by virtue of an execution, an order of attachment, or an attachment for the payment of money in an action, or a warrant for the collection of money issued by the comptroller or by a county treasurer or by any agency of the state or a political subdivision thereof, or for collecting a fine by virtue of a commitment for civil contempt, to poundage of, in the counties within the city of New York, five per cent of the sum collected and in all other counties, five per cent upon the first two hundred fifty thousand dollars collected, and three per cent upon the residue of the sum collected.

***

3. Where a settlement is made, either before or after judgment, after a levy by virtue of an order of attachment, the sheriff is entitled to poundage upon the value of the property levied upon, not exceeding the sum at which the settlement is made. Where an order of attachment is vacated or set aside, the sheriff is entitled to poundage upon the value of the property levied upon, not exceeding the amount specified in the order of attachment, and the court may order the party at whose instance the order of attachment was granted to pay the same to the sheriff. Where an order of at-

tachment is otherwise discharged by order of the court, the sheriff is entitled to the same poundage, to be paid by the party at whose instance the order of attachment is discharged, and the sheriff is entitled to retain the property levided upon until the poundage is paid. The maximum amount upon which poundage shall be computed, if such a settlement is made or the order of attachment is vacated or set aside, is one million dollars.

Section 27 of the Securities Exchange Act of 1934, 15 U.S.C. 78aa, provides:

> The district courts of the United States, the United States District Court for the District of Columbia, and the United States courts of any Territory or other place subject to the jurisdiction of the United States shall have exclusive jurisdiction of violations of this title or the rules and regulations thereunder, and of all suits in equity and actions at law brought to enforce any liability or duty created by this title or the rules and regulations thereunder. Any criminal proceeding may be brought in the district wherein any act or transaction constituting the violation occurred. Any suit or action to enforce any liability or duty created by this title or rules and regulations thereunder, or enjoin any violation of such title or rules and regulations, may be brought in any such district or in the district wherein the defendant is found or is an inhabitant or transacts business, and process in such cases may be served in any other district or which the defendant is an inhabitant or wherever the defendant may be found. Judgments and decrees so rendered shall be subject to review as provided in sections 128 and 240 of the Judicial Code, as amended (U.S.C., title 28, secs. 225 and 347). No costs shall be assessed for or against the Commission in any proceeding

> under this title brought by or against it in the Supreme Court or such other courts.

Article III Section 1 of the New York Stock Exchange Constitution provides:

> "Any controversy between parties who are members, allied members, member firms or member corporations shall, at the insistance of any such party, and any controversy between a non-member and a member or allied member or member firm or member corporation arising out of the business of such member, allied member, member firm or member corporation, or the dissolution of a member, shall, at the insistance of the non-member, be submitted for arbitration, in accordance with the provisions of the Constitution and rules of the Board of Directors."

STATEMENT OF THE CASE

This appeal brings before this Court an action instituted by the well known stock brokerage firm of Shearson, Hammill & Co., Inc. ("Shearson") against Samuel H. Sloan ("Sloan") an individual securities broker dealer. The pleadings filed by Shearson alleged that in June, 1971 Shearson sold Sloan 500 shares of Document Systems, inc. at a price of 6.25 cents per share but that it mistakenly delivered instead 500 shares of Docutel Corp. The error, which was allegedly due to the closeness in name, was discovered in July, 1971, at which time Docutel Corp. was selling in the vicinity of $8-9 per share (27a). However, by December 30, 1971 the price of Docutel Corp. had risen to $20 per share and on that date Shearson wrote a letter to Sloan which demanded the delivery of 500 shares of Docutel Corp. or a check in the amount of approximately $10,000. (16a). Receiving no reply, Shearson instituted this suit in February, 1972, and since the price of Docutel Corp. had by then risen to approximately $25 per share,

demanded judgment in the amount of $12,500. (3a).

This action was commenced on February 2, 1972 by the obtaining of an order of attachment for $12,500 signed by New York State Supreme Court Justice Edward T. McCaffrey (5a) and by the service of a copy of said order upon the Chemical Bank, where Samuel H. Sloan & Co. ("Sloan & Co.") maintained an account, the same day. In so doing, counsel for Shearson followed the New York State rule which requires under certain circumstances that the obtaining of an order of attachment and the levy upon defendant's personal property thereto must take place before the service of the summons (8a, 10a-11a). See Wachtel, *New York Practice under the CPLR* p. 187 citing *Pennoyer v. Neff*, 95 U.S. 714 (1877).

The order of attachment was requested and obtained under Section 6201(7) of the New York Civil Practice Law and Rules ("CPLR") which has since been renumbered as CPLR §6201(8). This section provides that an order of attachment may be granted when

> "there is a cause of action to recover damages for the conversion of personal property, or for fraud or deceit."

Thus, Shearson's request for an order of attachment was based upon the assertion that this suit involves a cause of action to recover damages for the conversion of personal property, namely 500 shares of Docutel Corp. which Shearson allegedly delivered by mistake to Sloan. In order to obtain this order of attachment, Shearson was required by CPLR §6212(a) to file an affidavit demonstrating the existence of this cause of action and by CPLR §6212(b) to provide an undertaking in an amount fixed by the court. In this case, the court required Shearson to post a bond in the amount of $2,500 of which $1,250 was conditioned that Shearson was to pay Sloan all legal costs damages which might be sustained by reason of the attachment if Sloan recovered judgment or if it was finally decided that Shearson was not entitled to an attachment of defendant's

property and the balance of $1,250 was to pay the sheriff all of his allowable fees. (17a-18a).

The moving affidavit which Shearson filed as required by CPLR §6212(a) was by Armand Zerilli and was dated January 31, 1972 (8a). Five exhibits were annexed to this affidavit. (12a-16a). The affidavit stated that on or about June 18, 1971 defendant Sloan & Co. purchased 500 shares of Document Systems, Inc. at 1/16 for a total price of $31.25 with a settlement date of June 25, 1971 and that on settlement date the plaintiff delivered to Sloan & Co. 500 shares of Docutel Corp. (9a). The affidavit further stated that the value of Docutel Corp. was substantially higher than Document Systems, Inc. and that the error was due to the closeness of name. (9a).

Then the affidavit stated that Sloan & Co. was notified of the error. (9a). Attached to the affidavit as Exhibit B was a form letter dated August 11, 1971 which according to the affidavit indicated the error. (13a). The affidavit further stated that much procrastination followed by the defendant until late December, 1971 and that the plaintiff learned that the certificates in question totalling 500 shares of Docutel Corp. were sold by Sloan & Co. in "the normal course of its business" to First of Texas, Inc. (9a). Attached as exhibits were "microfilms" of the five certificates. (14a). However, the reproductions of these certificates were of such poor quality that they were virtually impossible to read.

Furthermore, the affidavit stated that on December 30, 1971 the plaintiff sent to the defendant a "demand for payment" which gave the defendant seven days to cover the 500 shares of stock or pay the value thereof and that the defendant neither returned like certificates nor paid the value thereof. (10a). Finally, the affidavit stated that the highest value this stock reached within a reasonable time after the "conversion" by the defendant was $25.00 per share for a total value of $12,500.00 for the 500 shares converted by defendant and that upon information and

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belief there was no bid price for Document Systems, Inc. and therefore no present value for it. (10a).

At the same time that it filed an ex parte request for an order of attachment, Shearson filed a complaint with the clerk of the New York State Supreme Court, New York County. However, the first notice Sloan received that this action had been commenced came, not in the form of a service of a summons and complaint, but in the form of a notification from his bank that all the funds in his account had been attached. Thereafter, Sloan's attorney served Shearson with a demand for papers in accordance with CPLR §6212(d). Shearson complied with this demand. Immediately thereafter, Sloan, by his attorney, moved via an order to show cause to vacate the order of attachment. (19a-20a). On February 14, 1972, while this motion was pending, the Chemical Bank paid a check in the amount of $12,500 to the Sheriff of the City of New York pursuant to the order of attachment. See Appendix EE.

Sloan's moving affidavit in support of his motion to vacate the order of attachment contested every material factual allegation made by Shearson. In addition it pointed out that the letter dated August 11, 1971 bore no address and that there was no evidence that this letter had been delivered to the defendant. (In fact, the affidavit of Armand Zerilli contained no statement that this letter was ever sent to the defendant.) Furthermore, the moving papers contained various price and statistical information for Docutel Corp. which showed that on or about June 25, 1971, Docutel Corp. was selling for about 9-1/2, that by July 31, 1971 it had fallen to about 8, and that from that time forward it commenced to rise steadily in price (27a-29a) until December 30, 1971 when it reached 20 and mid-January, 1972 when it reached 25. The defendant argued that assuming that everything contained in the affidavit of Armand Zerilli was true, the highest price reached by Docutel Corp. within a "reasonable time" after the "conversion" was not $25.00 but actually 8 or 9-1/2 depending on whether the conversion could be said to have taken place on August 11, 1971 or on June 25, 1971. Furthermore, the moving affidavit stated that the defendant had requested proof of the alleged erroneous delivery and that the plaintiff had failed to comply with this request. (23a).

In response to this motion, Shearson filed opposing papers consisting of three affidavits which hotly contested the factual statements made by Sloan. One of these was an affidavit of Irving Serota, an attorney for Shearson, which stated that "no credance should be given to any part of [Sloan's] affidavit." (37a). Another was an affidavit of Walter Lamb, a cashier at Shearson, which stated that Shearson had first learned of the erroneous delivery during an "inter-office investigation" late in July, 1971 (31a) and that Lamb had personally visited Sloan's office to inquire concerning the matter on December 17, 1971. (32a). The affidavit also stated that Lamb had spoken to Sloan and that contrary to what Sloan had stated in his affidavit, Sloan had not requested that Shearson provide any documentation proving the erroneous delivery (32a).

On February 17, 1972, Sloan's motion to vacate the order of attachment was denied by New York State Supreme Court Justice Vincent A. Lupiano (41a-42a). In denying this motion, Justice Lupiano did not set the matter down for a preliminary evidentiary hearing on the merits of Shearson's claims in spite of the dispute on issues of material fact which existed between the opposing affidavits. Instead of resolving the factual issues, Justice Lupiano issued a decision which said that Sloan had "ample remedy . . . by obtaining a bond . . ." (41a).

Following the denial of this motion, Sloan's attorney moved for an order directing that the action instituted by Shearson be stayed and that the controversy in all respect proceed to arbitration by the New York Stock Exchange and that the order of attachment previously obtained by plaintiff be vacated on the grounds that Shearson as a

member of the New York Stock Exchange is bound by its rules and regulations to arbitrate a dispute with a non-member at the instance of the non-member. (45a). This motion was "in all respects granted." (46a). However, in what appears to be a clear judicial error, the part of the order which directed that the order of attachment dated February 2, 1972 be vacated was stricken by the court thus leaving an order with an ambiguous and unclear meaning. (46a). The unclear meaning of this order, combined with the unwillingness of Shearson to proceed to arbitration promptly and the delays both in the arbitration proceeding and in the courts, also necessitated the barrage of motions which followed.

After the signing of this ambiguous order, Sloan discharged his attorney and proceeded to appear in person and moved again to vacate the order of attachment. Although he asked that his new motion be referred to Judge Starke it was in fact referred to Justice Lupiano (47a) who then re-referred it back to Justice Gellinoff. (48a). The basis of this motion was that Shearson had failed and refused to commence arbitration proceedings and that, in any event, the amount of the order of attachment should be reduced to $5,000.00 and that the undertaking of the plaintiff should be increased to $400,000.00. In his moving papers, Sloan cited *German v. Snedecker* (1939) 257 App. Div. 596; *Hayward v. Edwards*, 4 N.Y.S. 2d 699, 167 Misc. 694 (1938); *Gelb v. Zimet Bros. Inc.*, 228 N.Y.S. 2d 111, 34 Misc. 2d 401 (1962); and a general discussion concerning the conversion of securities with a rising market value contained in 31 ALR 3rd 1322. The purpose of these citations was to show that Shearson could not possibly be entitled to recovery of more than $5,000.00.

On August 4, 1972, Mr. Justice Gellinoff denied Sloan's motion subject to renewal on condition that Shearson commence the arbitration proceedings within 20 days after service of a copy of the order with notice of entry. (50a).

On August 31, 1972, Sloan moved again to vacate the order of attachment on the grounds that Shearson still had not commenced arbitration proceedings. Mr. Justice Postal granted the motion unless Shearson "commences arbitration on or before October 5, 1972." (53a).

On October 3, 1972 Shearson commenced arbitration proceedings by a letter to the New York Stock Exchange bearing that date. However, the submission to arbitration was different from the action before this court in the following material respects:

1. The parties were different, in that Harry G. Theodos, who was alleged to be a partner in Sloan & Co. in the complaint of this action, was not included as a respondent in the arbitration proceeding. (75a).

2. Although Shearson claimed to be entitled to recovery of $12,500.00 in the complaint, it alleged damages in the amount of $13,614.70 in the arbitration proceeding. (76a).

3. Shearson claimed to be entitled to an additional $5,000.00 in counsel fees in the arbitration proceeding whereas no request was made for counsel fees in the court action. (76a).

4. As an exhibit in the arbitration proceeding, Shearson purported to show copies of confirmations by First of Texas, Inc. for the sale of 500 shares of Docutel Corp. for $4,762.50 by Sloan. No such exhibit was included in the court action. (76a).

After the matter had been submitted to arbitration, Sloan moved to dismiss in the Supreme Court. Among the grounds for this motion were that the New York State Supreme Court had no subject matter jurisdiction in that the controversy involved matters of federal securities laws which were in the exclusive jurisdiction of the United States District Courts under section 27 of the Securities Exchange Act of 1934 (15 U.S.C. §78aa) and that this controversy had been submitted to arbitration before the New York Stock Exchange and that Sloan was therefore entitled to

have this action dismissed. Sloan also moved to drop Harry G. Theodos as a party defendant. On December 20, 1972, Mr. Justice Dickens granted the motion to the extent of dropping Harry G. Theodos as a party defendant and in all other respects the motion was denied. (54a-56a).

On May 24, 1973, Sloan moved to vacate the order of attachment on the grounds of *Fuentes v. Shevin*, 407 U.S. 67 (1972) in that the attachment statute of the State of New York was unconstitutional and that Sloan had been deprived of notice and an opportunity for a hearing and had therefore been denied of property without due process of law in violation of the rights guaranteed to him by the Fifth and Fourteenth Amendments to the Constitution of the United States. On July 20, 1973, this motion was denied by Mr. Justice Evans.

The New York Stock Exchange set a date in early August, 1973 for the arbitration hearing. However, Shearson advised the New York Stock Exchange by letter that it would be unable to go forward on that date. The New York Stock Exchange then cancelled the hearing and subsequently set a new hearing date in December, 1973.

On October 9, 1973, Sloan moved to reduce the ad damnum clause in the complaint to $4,500.00 and to remove the action to the Civil Court for the City of New York on the grounds that the plaintiff, as a matter of law, could not be entitled to a recovery of greater than $4,500.00. This motion was denied by Mr. Justice Carney. (57a).

The December, 1973 arbitration hearing was cancelled due to a snowstorm in New York City which prevented certain of the arbitrators from being present. Sloan thereafter departed on a trip to Europe. Subsequently, the New York Stock Exchange set a new hearing date for February 12, 1974. As a result, Sloan was compelled to cut short his trip to Europe and rush back to the United States in order to be present at the arbitration hearing which was

finally being held more than two years after this action had been commenced.

On February 14, 1974 the arbitrators rendered a decision awarding the sum of $11,015.56 to Shearson. (78a). On March 15, 1974 Sloan commenced a new action in the Supreme Court for the County of New York entitled *Sloan v. Hoblin, et al.*, Index No. 4066/1974, in which he alleged that three witnesses who testified for Shearson had knowingly given false testimony and that the arbitrators had been defrauded thereby.[2]

Also, on March 15, 1974 plaintiff proceeded by "notice of petition" to confirm an arbitration award in this action. (81a). However, the plaintiff did not serve the notice of petition on the defendant. Instead, it served Robert W. Taylor, Esq., an attorney who had appeared in behalf of the defendant at the arbitration proceeding. This petition was granted on default by Mr. Justice Quinn on Mrarch 15, 1974.

On March 29, 1974, the defendant moved via an order to show cause to open the default. (60a-61a). After adjournments at the request of Shearson, the motion was made returnable on April 29, 1974. After considering the motion for four and one half months, Mr. Justice Greenfield decided it on September 13, 1974. Subsequently, after Shearson had submitted a proposed settle order. Mr. Justice Greenfield modified the decision and struck the paragraph which had said settle order and the new decision was published in the New York Law Journal.

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2. On April 16, 1975 Supreme Court Justice Alfred J. Callahan decided Shearson's motion to dismiss Sloan's complaint in this new action as follows:

> "Motion by defendants to dismiss complaint is granted, with leave to plaintiff to serve an amended complaint, if he is so advised. The opinion of Judge Breitel in *Burbrooke Mfg. Co. v. St. George Textile Corp.* 283 App. Div. 640 (1954) is controlling."

On October 3, 1974, Sloan moved via an order to show cause for reargument. This motion was denied on October 24, 1974. Meanwhile, on October 2, 1974, the default judgment of Mr. Justice Quinn was entered. (The judgment was not entered at an earlier date apparently as the result of a stipulation between the parties.) Sloan then appealed from this order and judgment.

On appeal, the Supreme Court of the State of New York, Appellate Division, First Department affirmed in a decision dated July 3, 1975. One of the judges on the five judge panel which decided the appeal was Mr. Justice Lupiano who also was the judge who denied the initial order of attachment. Sloan then moved for reargument on the grounds that Mr. Justice Lupiano was disqualified from reviewing his own order on appeal. This motion was denied on September 11, 1975.

Sloan then appealed to the State of New York Court of Appeals as of right in accordance with CPLR 5601(b)(1) and thereafter filed a jurisdictional statement, a brief, an appendix and a supplemental appendix. However, Shearson did not file an answering brief. More than three months after Shearson's time to file a brief had expired, it moved to dismiss the appeal on the ground that the constitutional question concerning the validity of the New York attachment statute had become "moot" in this case. Sloan then cross-moved to preclude Shearson from filing a brief. The State of New York Court of Appeals decided these motions on September 21, 1976 by dismissing Sloan's appeals.

HOW FEDERAL QUESTIONS WERE PREVIOUSLY PRESENTED

The question of the constitutionality of the New York State attachment statute was presented by Sloan in various motions filed in the New York State Supreme Court, New York County to vacate the order of attachment. In support of his contention that the New York State attachment

statute was unconstitutional, Sloan cited due process considerations and, after it was decided, this Court's decision in *Fuentes v. Shevin*, 407 U.S. 67 (1972). The other federal questions set forth in this appeal, except for question 7, were presented to the Supreme Court of the State of New York, New York County and were rejected in the opinion of New York State Supreme Court Justice Greenfield dated September 13, 1974.

Questions 1-6 were thereafter presented to the New York State Supreme Court, Appellate Division, First Department in the briefs and oral argument of the appeal to that Court. Following the decision of that court affirming the judgment below, question 7 was presented in the form of a motion for reargument. Questions 1-7 were then presented in the brief filed by Sloan in the State of New York Court of Appeals.

GROUNDS UPON WHICH IT IS CONTENDED THAT THE FEDERAL QUESTIONS ARE SUBSTANTIAL.

In *Financial Services Inc. v. Ferrandina*, 474 F.2d 743, 746 (2d Cir. 1973) the United States Court of Appeals for the Second Circuit characterized the question of the constitutionality of the New York State attachment statute as "plainly substantial" in light of this Court's decisions of *Fuentes v. Shevin, supra* and *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969). Since that time this Court has decided *North Georgia Fishing Co. v. Di-Chem*, 419 U.S. 601 (1975) which declared unconstitutional a Georgia attachment statute for practical purposes indistinguishable from the New York State attachment statute as applied in the instant case. Moreover, in *Sugar v. Curtis Circulation Co.*, 383 F. Supp. 643 (S.D.N.Y. 1974) a three judge United States District Court declared the New York State attachment statute to be unconstitutional. That decision, however, was set aside by this Court in *Carey v. Sugar*, 425 U.S. 73 (1976), which remanded the case to the district court with directions to abstain in accordance with

Railroad Commission v. Pullman Co., 312 U.S. 496, 499-501 (1941) from deciding the constitutional question.

The abstention doctrine does not, of course, apply to the instant appeal since the appellant has, over a period of nearly five years, exhausted every remedy available in the New York State courts. Moreover, the constitutional question, as set forth in the above mentioned decisions and in *Mitchell v. W.T. Grant*, 416 U.S. 600 (1974), is squarely presented in this case because the appellant was clearly denied a meaningful opportunity to vacate the order of attachment in the New York State courts. In particular, on February 11, 1972 defendant-appellant moved to vacate the order of attachment and filed an affidavit disputing every material factual allegation made by plaintiff. Under these circumstances, the Constitution requires that the matter should have been set down for a preliminary hearing on the merits of plaintiff's claims. Nevertheless, the motion to vacate the order of attachment was denied without a hearing. Thus, it is apparent that under *North Georgia Fishing Co. v. Di-Chem, supra*, the effect New York State attachment statute in this case was to cause a deprivation of Sloan's property and due process rights as guaranteed by the Fourteenth Amendment to the Constitution.

Actually, the question presented here is clearer than that presented in *North Georgia Fishing Co., supra*, because here the plaintiff was required to post a bond of only $2500 of which half was to insure that the sheriff would be paid all of his allowable fees. Thus, the bond required by the New York State Supreme Court in this case was only one-fifth of the amount attached as opposed to the Georgia statute which required the posting of a bond double the amount sought to be attached. Moreover, New York law does not provide and has not provided in this case for a fact hearing at any stage of the litigation on the question of the validity of the order of attachment. Thus, under *North Georgia Fishing Co., supra*, the four judges who dissented there should be unanimously of the view that the New York State

attachment statute is unconstitutional.

In spite of the fact that this Court and the lower federal courts, to the extent they have expressed a view on the question, have been consistently of the opinion that statutes closely analogous to the New York State attachment statute are unconstitutional, New York State judges and commentators have invariably stated that the attachment statute is constitutional. For example, the constitutionality of the attachment statute was upheld in *Regnell v. Page*, 82 Misc. 2d 506, 369 N.Y.S. 2d 936 (1975), a case cited by Shearson when the appeal in this action was argued before the Appellate Division, First Department. However, New York State judges and lawyers may not be in a position to be objective concerning the question of the constitutionality of the attachment statute in view of the fact that a large amount of revenues and litigation are generated in New York State as a result of the attachment statute. Because of the existence of the attachment statute, many suits can be maintained in New York State, where juries are known to award higher judgments than in other states, due to the expansive view the New York State Courts have concerning their own jurisdiction. In *Seidler v. Roth*, 17 N.Y. 2d 111, 269 N.Y.S. 2d 99 (1966), a landmark case in New York law, the State of New York Court of Appeals held that in a case where an automobile liability insurance policy was issued in Canada to a Canadian motorist by an insurer doing business in New York and an automobile accident occurred in Vermont which injured a New York resident and where the Canadian motorist was in no way subject to *in personam* jurisdiction in New York, a suit could nevertheless be maintained in New York State by the plaintiff obtaining an order of attachment and serving it on the insurance company, with out of state service upon the defendant pursuant to CPLR §314(3). As a result, what is known as the *Seidler v. Roth* doctrine has enabled thousands of cases to be litigated in New York State which would not be there were it not for the New York State attachment statute.

This, of course, is a great boon to the lawyers practicing in New York State. It also generates considerable revenues for the state since, pursuant to CPLR §8012(b), every time an action is commenced pursuant to an order of attachment, the sheriff is entitled to poundate from the prevailing party of 5% of the amount attached. It is thus easy to see that millions of dollars in state revenues are at stake in any challenge to the constitutionality of the New York State attachment statute.

As stated previously, counsel for Shearson moved to dismiss Sloan's appeal to the State of New York Court of Appeals where the appeal raised this constitutional question on the grounds that the question had become moot. The argument presented by Shearson was that the fact that a judgment had been entered in favor of Shearson and the fact that the $12,500, which the Sheriff of New York County had been holding since Feb. 14, 1972 pursuant to the order of attachment, had been used to satisfy the judgment obtained by Shearson, the question of the validity of the order of attachment was moot. It is clear that the State of New York Court of Appeals did not and could not agree. The order dismissing the appeal stated that "no substantial constitutional question is directly involved" in this appeal. This statement must be viewed in conjunction with CPLR §5601(b) which permits an appeal as of right to the State of New York Court of Appeals "from an order of the appellate division which finally determines an action where there is directly involved the construction of the constitution of the State or of the United States." It is clear that had the State of New York Court of Appeals agreed with Shearson that the constitutional question is moot in this case, it would have stated that "no constitutional question is directly involved" in this appeal and that by inserting the word "substantial" before the words "constitutional question," the State of New York Court of Appeals was upholding the constitutional validity of the attachment statute. In so doing, it was acting consistently

with numerous other New York State Court decisions, some of which were cited by this Court in *Carey v. Sugar, supra.*

In any event, the claim by Shearson that the constitutional question is moot is groundless. For one thing, the order of attachment attached the sum of $12,500 whereas the decision subsequently rendered by the New York Stock Exchange arbitrators was that Sloan would pay Shearson the sum of $11,015.56. From this it would appear that Sloan was entitled to the return of the difference of $1484.44. However, because of the attachment order 5% of $12,500, which amounts to $625, was deducted to pay poundage to the sheriff. The remainder went to pay charges, costs and interest to Shearson from February 14, 1974, the date of the decision of the arbitrators, to the date approximately a year later when the sheriff got around to paying the money to Shearson. As a result, no part of the $12,500 was returned to Sloan. If the order of attachment were declared invalid Sloan would be entitled to recover at a minimum the poundage of $625 and, since the arbitrators computed in the interest in making their decision, Sloan would be entitled to interest on $12,500 from Februrary 2, 1972 until February 19, 1974 as well as interest on $1484.44 from February 14, 1974 forward. In addition, Sloan would be entitled to recover "all legal costs and damages" as Shearson agreed to pay at the time it posted a bond for $2500. See *Minskoff v. Fidelity and Cas. Co. of N.Y.*, 28 A.D. 2d 85, 281 N.Y.S. 2d 410 (1st Dept. 1967), *aff'd* 23 N.Y. 2d 706 (1968).

However, these figures are merely the minimums since if Sloan prevails in this appeal he is entitled to the restitution of much more. Since the jurisdiction of the New York State Supreme Court over this case is based upon the order of attachment, it follows that if the order of attachment is declared invalid, the judgment must be vacated and the entire $12,500 plus costs and interest must be returned to Sloan. It is true that after Shearson had levied on Sloan's

bank account, Sloan appeared in this action without contesting service of process and that, in addition, Shearson provided all papers filed in this action to Sloan's attorney. This circumstance leads Shearson to contend that the New York State Supreme Court has jurisdiction over Sloan even without the benefit of the order of attachment. However, once Sloan's property was taken pursuant to the order of attachment he had no choice but to come into this action and to accept or waive the requirement of service of process if he wanted to get his money back in view of the New York requirement that a party moving to vacate an order of attachment must demonstrate that it is unnecessary for jurisdictional purposes. See Wachtel, *New York Practice Under the CPLR*. p. 197.

There is a further problem with Shearson's mootness argument which is that an order of attachment is not itself appealable in either the state or federal courts. Under CPLR §5701(a)(3) an order refusing to vacate or modify an order of attachment is appealable to the Appellate Division. However, in *Richmond v. Richmond*, 41 A.D. 2d 993, 344 N.Y.S. 2d 52, 54 (Third Dept. 1973) the Appellate Division held that an appeal from an order denying a motion to vacate an order of attachment was "not an appropriate proceeding in which to attack the constitutionality of the attachment statute." The federal courts have applied an even harsher rule, stating that no appeal will lie from an order refusing to vacate an order of attachment. *Financial Services Inc. v. Ferrandina, supra*, 474 F. 2d at 746.

Moreover, under CPLR §5601(b)(1) there is no right of appeal to the Court of Appeals on a constitutional question except from an order of the Appellate Division "which finally determines an action." Therefore, it is never possible to appeal as of right to the Court of Appeals on the question of the constitutionality of the attachment statute, unless a final judgment has been entered in the action in which the appeal is taken. Thus, the appellant raised this constitutional argument in the State of New York Court of

Appeals at the earliest available opportunity. Consequently, if Shearson's argument that the entry of a judgment renders moot the question of the validity of a prior order of attachment entered in an action, the result would be that the State of New York Court of Appeals could never determine the question of the constitutional validity of the attachment statute in the context of an appeal as of right. This circumstance in turn would frustrate review by this Court since this Court generally will not pass upon a question of the constitutionality of a state law unless the question has been passed upon by the highest court of the state.

It should be noted that CPLR §5501(a) provides:

> "An appeal from a final judgment brings up for review:
>
> 1. Any non-final judgment or order which necessarily affects the final judgment . . ."

Since the order of attachment and the orders in this case denying the motions to vacate the order of attachment were all non-final, appellant was entitled to obtain review of them at the time of the appeal from the final judgment. Moreover, the New York Court of Appeals has held that he may do so even though he might have taken an appeal from a intermediate order. See *Cohen v. Cohen*, 3 N.Y. 2d 339, 344, 165 N.Y.S. 2d 452, 455 (1957).

Appellant also had the right to and did rely on the foregoing decisions which, in sum, hold that the time to obtain appellate review of the question of the constitutionality of the New York State attachment comes at the time of an appeal from an adverse final judgment and not sooner. Litigants such as Bert Sugar, the plaintiff in *Sugar v. Curtis Circulation Co., supra*, have spent considerable sums of money in attempts to have the question of the constitutionality of the New York State attachment statute decided prior to the entry of a final judgment. These attempts have been unsuccessful. Clearly, the route adopted by the appellant here is the only correct one and

this Court must therefore resolve the important constitutional questions presented.

It should not be overlooked that there are other federal and constitutional questions presented in this appeal. These and, in addition, certain state law questions were all presented in the brief filed by appellant in the State of New York Court of Appeals. The State of New York Court of Appeals, however, dismissed Sloan's appeal without passing upon these other questions and without even receiving a brief from counsel for appellee. This was erroneous. It is clear from CPLR §5501 that once the appellant had an appeal as of right under CPLR §5501(b)(1), he was entitled to an adjudication of every issue involved in this action, not merely the issues involving the construction of the constitution of the United States. Moreover, in *Rescue Army v. Municipal Court*, 331 U.S. 549, 569 (1947) this Court stated:

> "Constitutional issues affecting legislation will not be determined . . . if the record discloses some other grounds upon which the case may be disposed of . . ."

However, assuming *arguendo* that the State of New York Court of Appeals acted correctly in confining its decision to a determination of the constitutionality of the New York State attachment statute, this Court may properly consider all of the federal questions presented in this appeal since they were all presented to the Appellate Division, First Department and could not have been presented to this Court at an earlier date without foregoing the opportunity to appeal to the State of New York Court of Appeals.

Question No. 2, although presented here and below as a federal constitutional question, may also be presented as a question of state law. CPLR §403(c) states:

> "A notice of petition shall be served in the same manner as a summons in an action."

It is undisputed that Shearson did not and did not attempt to serve a copy of its notice of petition to confirm an

arbitration award in the manner required for the service of a summons in an action. This circumstance enabled Shearson to obtain a default judgment. Although Sloan then moved to vacate the default judgment, his appearance did not confer jurisdiction upon the court. See CPLR §3211(e). It is a violation of the due process clause of the Fourteenth Amendment for a state court to enter a judgment against a defendant without first having acquired appropriate jurisdiction. See e.g. *McDonald v. Mabee*, 243 U.S. 90 (1917).

Although Shearson's reasons for not serving Sloan with a copy of it's petition to confirm the decision of the New York Stock Exchange arbitrators are essentially irrelevant to a determination of the fundamental jurisdictional question, they are worth stating here. Sloan's original appearance in this action was through counsel but, on August 29, 1972, Sloan filed a consent which permitted him to appear pro se. (51a). Shearson, however, apparently preferred to have an attorney rather than a pro se litigant as an adversary and thereafter requested Judges Gellinoff, Postal and Dickens to require Sloan to retain counsel. A modicum of success was achieved when Judge Gellinoff made a decision which stated that Sloan "through counsel, may renew his motion [to vacate the order of attachment]." (50a).

Nevertheless, Shearson was unable to force Sloan to retain counsel in this action. However, when the arbitration hearing was held, Sloan's position was advocated by an attorney, Robert W. Taylor, Esq. Thereafter, when Shearson moved to confirm the decision of the arbitrators, it did not serve Sloan but instead served Taylor, in spite of the fact that Taylor had never appeared as counsel for Sloan in the court action. Taylor, not wishing to be drawn into a court action where he was not being paid to represent Sloan, decided not to to deliver Shearson's petition to Sloan (91a) and instead notified counsel for Shearson that he could not accept service in Sloan's behalf. (86a). Thereafter, counsel for Shearson, although aware of the fact that Sloan did not know that it's petition was pending,

submitted it on motion to the New York State Supreme Court and thereby obtained a default judgment. When Sloan thereafter moved to vacate the default judgment, Shearson argued that "Taylor . . . should have proceeded by application to this court to be relieved" (73a) which was precisely the situation Taylor was trying to avoid.

The actions by counsel for Shearson were clearly improper from an ethical point of view and, in addition, deprived Sloan of his Fourteenth Amendment due process rights. On these points alone, the default judgment should be vacated. Actually, it can be seen that Shearson resorted to outright trickery in obtaining the default judgment by using a false and fraudulent caption which made this appear to be an action to confirm an arbitration award. See 58a and 81a. This was obviously done in recognition of a New York procedural rule that a petition to confirm an arbitration award is a special proceeding and may not be filed in an existing action. The rule is set forth in *McNulty v. Solley*, 95 N.Y. 242 (1884) which states that "the rule is well settled that a submission to arbitration is a discontinuance of the suit." The cases reciting this principle of New York law are legion. See e.g. *Frey & Horgan Corp. v. Mitsui & Co., Ltd.*, 27 N.Y.S.2d 555 (1939); *Riddoch v. Sullivan*, 43 N.Y.S. 2d 595, 602 (1943); *Joseph F. Mittleman Corp. v. Murray L. Spies Corp.*, 134 N.Y.S. 2d 223 (1954). The enactment of CPLR §3211(a)(5) modified this rule slightly by adding the words "and award" so that now an action is subject to dismissal in New York State where there has been "arbitration and award," which is the case here. This principle is explained in *Langemyr v. Campbell*, 23 AD 2d 371, 374, 261 N.Y.S. 2d 500, 503 (1965). See also 22 Carmody-Wait 2nd 141:33-6 pp. 766-769.

The existence of this state procedural rule provides the basis for question no. 6 presented in this appeal. Here, again, the question is properly presented in due process terms as well as state law terms since Shearson employed cunning devices in order to ram through a default

judgment under circumstances prohibited by New York State law first by changing the caption to this case and then by failing to serve Sloan with the petition to confirm the arbitration award. It is clear that under these circumstances Sloan was deprived of "due process of law."

Questions no. 3 and 4 in this appeal present important federal questions which ought to be resolved by this Court. Section 27 of the Securities Exchange Act of 1934 gives the United States district courts "exclusive jurisdiction of violations of this title or the rules and regulations thereunder, and of all suits in equity and actions at law brought to enforce any liability or duty created by this title or the rules and regulations thereunder." The Constitution and rules of the New York Stock Exchange which govern arbitration proceedings exist in accordance with the rules of the Securities & Exchange Commission and were promulgated under Section 6 of the Securities Exchange Act of 1934, 15 U.S.C. §78f. It follows, therefore, that the decision by the New York Stock Exchange arbitrators directing Sloan to pay Shearson the sum of $11,015.56 was a "liability or duty" created by the rules of the New York Stock Exchange concerning arbitration which were promulgated in accordance with Section 6 of the Securities Exchange Act of 1934 and consequently "exclusive jurisdiction" to confirm the decision of the arbitrators rests in the federal courts. As a result, this Court should vacate the judgment entered in this case. See *The Moses Taylor*, 71 U.S. (4 Wall) 411, 428-430 (1867). This result is also required by *Merrill, Lynch, Pierce, Fenner & Smith, Inc., v. Ware*, 414 U.S. 117, 130 (1973) where this Court held that any action which touches upon questions of fair dealing and the protection of investors must be litigated in the federal forum.

The fact that this case involves questions of fair dealing and the protection of investors is obvious and this brings up question no. 50 presented in this appeal. It is clear that under the "manifest disregard for the law" standard set forth in *Sobel v. Hertz, Warner & Co.*, 469 F.

2d 1211 (2d Cir. 1972) *reversing* 338 F. Supp. 287 (S.D.N.Y. 1971), the decision of the New York Stock Exchange arbitrators must be vacated. Allegedly Shearson delivered the wrong stock to Sloan in June, 1971 and discovered the error in July, 1971. In such a case the computation of damages is governed by the "New York rule" set forth in cases such as *German v. Snedecker,* 257 A.D. 596 (1939); *Hayward v. Edwards,* 167 Misc. 694, 4 N.Y.S. 2d 699 (1938) and *Gelb v. Zimet Bros. Inc.,* 34 Misc. 2d 401, 228 N.Y.S. 2d 111 (1962), which provides that the plaintiff is entitled to recover the "highest value" within a "reasonable time" after the conversion took place. A "reasonable time" has been held to be as little as three days. This result is logical since if the rule were otherwise a plaintiff could do what the plaintiff did in *Gelb v. Zimet Bros. Inc., supra,* which was to wait for a considerable period of time after learning that the securities had been converted in order to try to obtain the greatest possible advantage from the inevitable market fluctuations. That is precisely what the cashiering personal of Shearson did in this case, assuming the allegations made by Shearson are true. Instead of buying the stock immediately to cover the error as soon as it was discovered, a course required by New York Stock Exchange rules, Shearson did nothing for seven months. Had the price of Docutel Corp. gone down, Shearson would have charged Slown with the June or July, 1971 price and would have taken as a profit the amount of the difference established by the decline. Instead, the price of Docutel Corp. went up and therefore Shearson charged Sloan the January, 1972 price which, on 500 shares of stock, was approximately $8000 more than the July, 1971 price. Consequently, with the execution of the judgment in this action, Sloan suffered an approximately $8000 out-of-pocket loss.[3]

3. In its submission to arbitration Shearson pointed to transactions settling July 20, 1971 where Sloan sold and delivered 400 shares of Docutel Corp. at 9-1/2 and 100 at 9-5/8 for a total sale price of $4762.50. This comes to $7737.50 less than the $12,500 which Sloan ultimately paid out. It is significant to note that the delivery took place on July 20, 1971 which was coincidentally the date when Shearson claimed it discovered the error but long before Shearson claims it first notified Sloan of the error. Consequently, it is apparent that had Shearson timely notified Sloan of the error it says it made, the matter could have been straightened out in July, 1971 and this entire litigation avoided.

It is thus apparent that the decision of the arbitrators was unconscionable and was rendered in manifest disregard of the law. The decision therefore must be set aside in accordance with *Sobel v. Hertz, Warner & Co., supra.* That, of course, was a federal case, but one of the points presented here is that Sloan has the right to litigate this particular issue in the federal forum and he was deprived of this right by the improper entry of the default judgment. A decision of a court to set aside the decision of the arbitrators here on the grounds of "manifest disregard for the law" would be most appropriate since Mr. Hoblin, house counsel for Shearson who represented Shearson at the arbitration hearing, asked the arbitrators several times during the arbitration hearing to ignore the applicable law. For example, page 73 of the transcript of the hearing shows that Mr. Hoblin stated to the arbitrators:

> "An arbitration panel is not bound by the law of the circuit. They have the power to do what they consider to be equity and whether or not it would be awardable in a court of law I don't think is relevant."

Even as a matter of State law, the decision of the arbitrators should have been vacated, modified or set aside on a number of grounds specified in CPLR §7511(b) and (c). These points will not be briefed in detail here, however, because the federal due process question presented in this appeal centers on the fact that New York State Supreme Court Justice Greenfield, in denying Sloan's motion to vacate the default judgment, refused to give Sloan an evidentiary hearing on the disputed issues of material fact concerning alleged corruption and fraud upon the ar-

bitrators. Clearly a hearing was required by the Constitution.

It is noteworthy that the arbitrators awarded upon a claim by Shearson for attorneys fees of $3675.[4] This was not permitted under principles set forth in the recent decision of *Garrity v. Lyle Stuart, Inc.*, 40 N.Y. 2d 354 (1976) and on this point alone the decision of the arbitrators should be set aside. Moreover, in New York State, the award of an arbitrator is subject to judicial revision if it is completely irrational. *Lentine v. Fundaro*, 29 N.Y. 2d 382, 385-386 (1972); *Matter of National Cash Register Co.*, [*Wilson*], 8 N.Y. 2d 377, 383 (1960). No rational basis has yet been suggested by Shearson for the decision of the arbitrators directing Sloan to pay Shearson the sum of $11,015.56.

The final question presented in this appeal concerns the fact that New York Supreme Court Justice Vincent A. Lupiano, sitting as a judge of the Appellate Division, First Department in this case, reviewed on appeal the decision he made in the lower court refusing to vacate the order of attachment. This Court has recognized a judge's personal motivation to engage in self-vindication when a case is reviewed on appeal. *Chaffin v. Stynchcombe*, 412 U.S. 17, 27 (1973). Moreover, in *Withrow v. Larkin*, 421 U.S. 35, 46 (1975) this Court reiterated the well established principle that a fair hearing is an impartial tribunal is required by the constitution.

The New York State courts have long held that a judge may not sit in review of his own decision. See *Pistor v. Hatfield*, 46 N.Y. 249 (1871); *Graham v. Linden*, 50 N.Y. 547 (1872); *Van Arsdale v. King*, 152 N.Y. 69 (1897). Analogeous federal cases have arrived at the same result. See *Rexford v. Brunswick-Balke, Co.*, 228 U.S. 339, 343-

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4. This was calculated as 49 billable hours at $75 per hour payable to the law firm of Leibowitz, Platzer & Fineberg. This law firm represented Shearson in the court proceeding but not in the arbitration proceeding.

344 (1913); *Berkshire Employees Association v. NLRB*, 121 F.2d 235 (3rd Cir. 1941). See also *Ward v. Village of Monroeville*, 409 U.S. 57 (1972). Due process considerations require that the decision of the Appellate Division, First Department be vacated and that the appeal to that court be reconsidered by a panel not to include Justice Lupiano.

CONCLUSION

For all of the reasons set forth above, this Court should note probable jurisdiction or should vacate the judgment and remand this case with instructions to dismiss the action.

Dated: December 20, 1976

Respectfully submitted,

Samuel H. Sloan
917 Old Trents Ferry Road
Lynchburg, Val. 24503

APPENDIX "A"
VERIFIED COMPLAINT

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

SHEARSON, HAMMILL & CO., INC.,

Plaintiff

-against-

SAMUEL H. SLOAN and HARRY G. THEODOS, as Co-Partners doing business under the firm name of SAMUEL H. SLOAN & CO.,

Defendants.

Plaintiff, by its attorneys, LEIBOWITZ & PLATZER, as and for its verified complaint herein alleges as follows:

AS AND FOR A FIRST CAUSE OF ACTION:

FIRST: Plaintiff is a corporation duly organized under the laws of the State of Delaware and authorized to do business in the State of New York with principal offices in the County of New York. Plaintiff is a broker-dealer registered with the Securities & Exchange Commission and is a member of the New York Stock Exchange.

SECOND: Upon information and belief that at all times hereinafter mentioned the defendant SAMUEL H. SLOAN & CO., was and now is a partnership consisting of SAMUEL H. SLOAN and HARRY G. THEODOS, and said company has its principal place of business in the County, City and State of New York.

THIRD: That on or about the 18th day of June, 1971 the defendant SAMUEL H. SLOAN & CO. ordered FIVE HUNDRED (500) shares of Document System, Inc. from the plaintiff for settlement on June 25, 1971.

FOURTH: That on or about the 25th day of June, 1971 the plaintiff inadvertently and erroneously caused to be delivered to the defendant Five Hundred (500) shares of Docutel Corp.

FIFTH: Upon discovery of the erroneous delivery of the aforementioned securities, the plaintiff notified the defendant and demanded return of said securities.

SIXTH: The defendant company agreed to search for and return the securities.

SEVENTH: The defendant did procrastinate in the delivery of said securities to the plaintiff.

EIGHTH: The defendant failed and neglected to return said securities or like securities or to pay the value of said securities.

NINTH: Upon information and belief the defendant did sell said securities in the ordinary course of its business to First of Texas Incorporated.

TENTH: That on or about December 30, 1971, the plaintiff did demand of the defendant return of the securities or payment for same within seven (7) days.

ELEVENTH: That the defendant failed, refused and neglected to return the securities rightfully owned by the plaintiff or to pay for said securities.

TWELFTH: That by said sale by the defendant and subsequent refusal to pay the reasonable value of said securities, the defendant did convert to its own use the property of the plaintiff, to wit, Five Hundred (500) shares of Docutel Corp.

THIRTEENTH: The highest value of Docutel Corp.

within a reasonable time after the plaintiff learned of the conversion, within which time plaintiff had an opportunity to go to the market to purchase these securities so converted by defendant, was $25.00 per share.

FOURTEENTH: Upon information and belief there was no bid price at the time of conversion for shares of Document Systems, Inc. and therefore of no value.

FIFTEENTH: That by reason of the aforementioned conversion, the plaintiff herein has been damaged in sum of Twelve Thousand, Five Hundred ($12,500) Dollars.

AS AND FOR A SECOND CAUSE OF ACTION:

SIXTEENTH: Plaintiff repeats, reiterates and realleges each and every allegation of the complaint numbered paragraphs "First" through "Fourteenth" inclusive, as if more fully set forth herein.

SEVENTEENTH: That by virtue of the aforesaid erroneous delivery the defendant has been unjustly enriched to the extent of Twelve Thousand, Five Hundred ($12,500.00) Dollars.

EIGHTEENTH: That the sum of said unjust enrichment is justly due and owing to the plaintiff and that by virtue thereof the plaintiff has been damaged to the extent of Twelve Thousand Five Hundred ($12,500) Dollars.

WHEREFORE, plaintiff demands judgment on the first and second causes of action against each of the defendants individually, Samuel H. Sloan and Harry G. Theodos, and against the partnership Samuel H. Sloan & Co. in the sum of Twelve Thousand Five Hundred ($12,500.00) Dollars with interest from the 30th day of December, 1971, together with the costs and disbursements of this action.

LEIBOWITZ & PLATZER
Attorneys for Plaintiff
Office & P.O. Address
299 Broadway
New York, N.Y. 10007

[Verified by
Armand Zerilli
On January 31st 1972]

APPENDIX "B"
ORDER OF ATTACHMENT

At a Special Term, Part II, of the Supreme Court of the State of New York, held in and for the County of New York at the Courthouse at 60 Centre Street, in the Borough of Manhattan, City and State of New York, on the 2nd day of February, 1972.

PRESENT: HON. EDWARD T. McCAFFREY
Justice

SHEARSON, HAMMILL & CO., INC.,

Plaintiff,

-against-

SAMUEL H. SLOAN and HARRY G. THEODOS, as Co-Partners doing business under the firm name of SAMUEL H. SLOAN & CO.,

Defendants.

A motion having been made by the plaintiff, Shearson, Hammill & Co., Inc., for an order of attachment against the property of the defendant Samuel H. Sloan & Co. in an action in the Supreme Court, State of New York, County of New York.

Now, on reading and filing the Summons and Verified Complaint herein, the affidavit of Armand Zerilli, duly sworn to the 31st day of January, 1972, wherein it appears that a cause of action for a money judgment exists in favor

of the said plaintiff and against the said defendants as partners in Samuel H. Sloan & Co. and individually, for the sum stated in said affidavit, namely $12,500.00 with interest from the 30th day of December, 1971, and that said plaintiff is entitled to recover said sum above all counterclaims known to it,

And it being further shown by said affidavit and complaint that the said plaintiff is entitled to an order of attachment against the property of the said defendant Samuel H. Sloan & Co. on the ground that the cause of action herein is in conversion, and the undertaking required by law having been submitted herewith;

NOW, on motion of Leibowitz & Platzer, attorneys for the plaintiff, it is

ORDERED, that the said plaintiff's undertaking be and the same hereby is fixed in the sum of $2,500.00 of which amount the sum of $1,250.00 thereof is conditioned that the said plaintiff will pay to the said defendant all legal costs and damages which may be sustained by reason of the attachment if the said defendant recovers judgment or it is finally decided that the plaintiff was not entitled to an attachment of the defendant's property, and the balance thereof conditioned that the said plaintiff will pay to the Sheriff all of his allowable fees, and it is further

ORDERED, that the Sheriff of the City of New York, or the Sheriff of any county of the State of New York levy within his jurisdiction, at any time before final judgment, upon such property in which the defendant Samuel H. Sloan & Co. has an interest and upon such debts owing to the defendant Samuel H. Sloan & Co. as will satisfy the plaintiff's demand of $12,500.00, together with probable interest, costs and the said Sheriff's fees and expenses, and that he proceed hereon in the manner required by law.

Enter within 10 days

s/E.T.M.
J.S.C.

Leibowitz & Platzer
Attorneys for Plaintiff
299 Broadway
New York, N.Y. 10007
Tel. No. 267-0420

Filed February 8, 1972

APPENDIX "C"
AFFIDAVIT OF ARMAND ZERILLI
TO OBTAIN AN ORDER OF ATTACHMENT

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

SHEARSON, HAMMILL & CO., INC.,

Plaintiff,

-against-

SAMUEL H. SLOAN and HARRY G. THEODOS, as Co-Partners doing business under the firm name of SAMUEL H. SLOAN & CO.,

Defendants.

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

ARMAND ZERILLI, being duly sworn, deposes and says:

That he is the First Vice-President of Shearson, Hammill & Co., Inc., the corporate plaintiff in the within action, and is fully familiar with all the facts and circumstances in this matter from documents and records in his possession.

This affidavit is submitted in order to obtain an order of attachment pursuant to the provisions of CPLR 6201 (6) against Samuel H. Sloan and Harry G. Theodos who upon information and belief are doing business under the firm name of Samuel H. Sloan & Co.

An action has not been commenced to recover damages

on account of the claim set forth herein to date. The plaintiff has a good and meritorious cause of action against the firm of Samuel H. Sloan & Co. and the individuals doing business as such in the sum of $12,500.00 and is entitled to recover said sum from the defendants with interest from Dec. 30, 1971 which is over and above any counterclaims that may be alleged to the best knowledge and belief of your deponent. This action is for the conversion of securities owned by the plaintiff. The cause of action arose out of the following circumstances:

On or about June 18, 1971 Samuel H. Sloan & Co., upon information and belief a broker-dealer, purchased from the plaintiff 500 shares of Document System, Inc. at 1/16th for a total of $31.25 with a settlement date of June 25, 1971. Annexed hereto as Exhibit "A" is the original confirmation of that trade with the signature of the defendant and the date "6/24" affixed thereto. In addition the defendant's stamp is shown on the confirmation.

On the settlement date the plaintiff delivered to Samuel H. Sloan & Co. 500 shares of Docutel Corp. The error was due to the closeness in the name. The value of Docutel was substantially higher than Document System, Inc.

When the error was discovered Sloan & Co. was notified. The defendant agreed to check it out and return the securities. Annexed hereto as Exhibit "B" is a form letter dated August 11 1971 which indicates the error.

Thereafter much procrastination followed by the defendant until late December, 1971. The plaintiff learned that the certificates in question totalling 500 shares of Docutel Corp. were sold by Samuel H. Sloan & Co. in the normal course of its business to First of Texas Incorporated. Annexed hereto collectively as Exhibit "C" are microfilms of the five certificates, each for 100 shares equalling the 500 shares of Docutel Corp. The Court will note that stapled to Certificate No. N98046 is a copy of the receipt stamped by the defendant's company, number 350821, showing Document System. Annexed hereto as

Exhibit "D" is a photostat from the original Receipt Number 350821 stamped by the defendant company which was returned to the plaintiff after acceptance of the five 100 share certificates of Docutel Corp.

When it became apparent that the defendant was not going to live up to its promise to return the erroneously delivered certificates or pay for the value thereof a demand for payment was made on December 30, 1971 which is annexed hereto as Exhibit "E". The defendant was given seven days to cover the 500 shares of stock which is normally done or pay for the value thereof. The defendant neither returned like certificates nor paid for the value thereof. The highest value this stock reached within a reasonable time after the conversion by the defendant, in which time the plaintiff could have gone to the market and purchased same, was $25.00 per share for a total value of $12,500.00 for the 500 shares converted by the defendant.

Your deponent as an active officer of a brokerage firm daily reviews the fluctuation of the prices of the various securities. Your deponent verily believes that $25.00 per share was the reasonable and highest value of Docutel Corp. within the time the plaintiff could have replaced the securities.

Upon information and belief there is no bid price for Document System, Inc. and therefore no present value for it.

Plaintiff would be entitled to a judgment in this action based upon the aforesaid conversion by the defendants of plaintiff's property, the defendants having appropriated for their own use the proceeds of the sale of the securities of the plaintiff which defendants knew and were informed were the property of the plaintiff. Pursuant to Section 620, Subdivision (7) of the CPLR the plaintiff would be entitled to an order of attachment based upon this action for conversion.

The plaintiff is about to commence an action against

said defendants and the firm of Samuel H. Sloan & Co. for the cause of action above stated by issuing the annexed summons and complaint.

That no prior application has been made to any other court or judge for the relief sought herein or for any similar relief.

WHEREFORE, deponent prays that an order of attachment be issued against said defendants doing business as Samuel H. Sloan & Co.

s/Armand Zerilli
ARMAND ZERILLI

Sworn to
January 31st 1972

EXHIBIT "A"
ORIGINAL CONFIRMATION OF TRADE

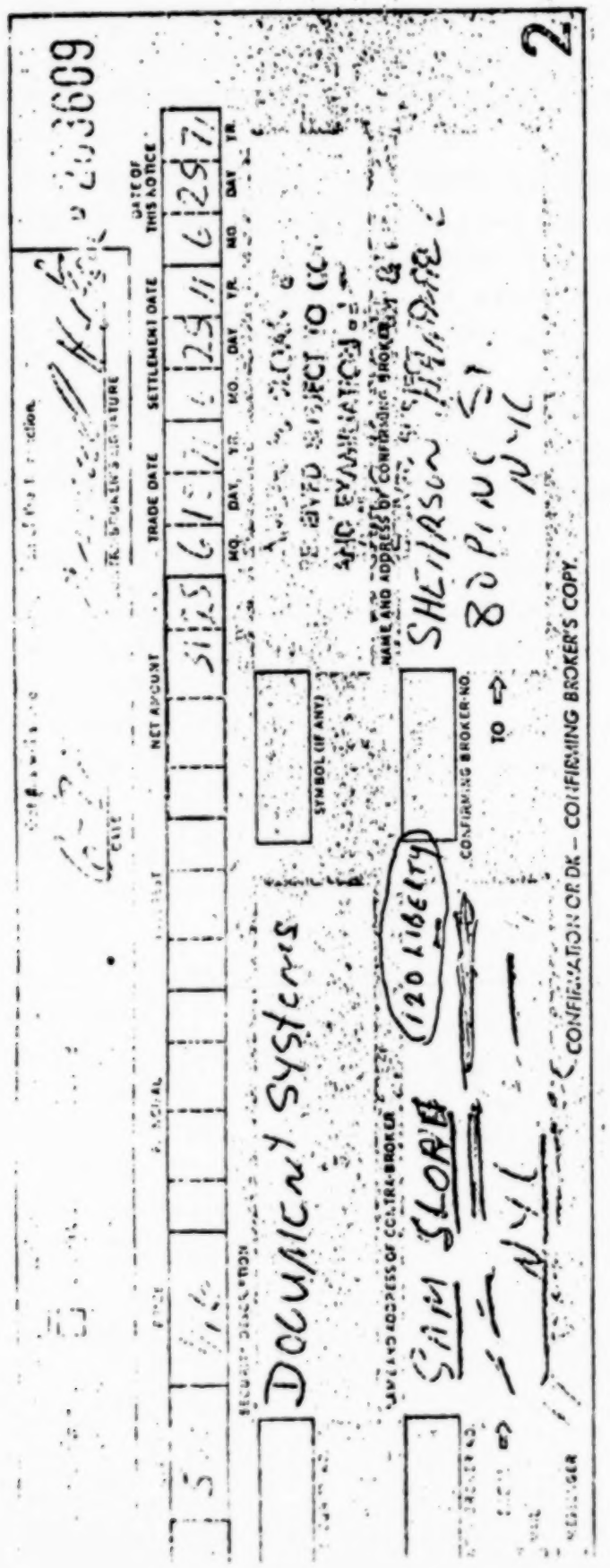


EXHIBIT "B"
LETTER DATED AUGUST 11, 1971

Shearson, Hammill & Co.
Incorporated Founded 1902
80 Pine Street
New York 10005

8-11-71

ntion: Cashier

lemen:

6-25-71, we ~~(received from)~~ (delivered to) you 500 share
DOCUTEL CORP.
as evidenced by certificate n...
100/N 9046-48 100/N 11287 100/N 11454

houlc have ~~(received)~~ (delivered) 500 shares of
DOCUMENT SYSTEMS

trade was for settlement 6-25-71 for $ 31.25.

above stock was (delivered) (received):

- ☐ thru the New York Stock Exchange Clearing Corp.
- ☐ thru the American Stock Exchange Clearing Corp.
- ☐ thru the National OTC Exchange Clearing Corp.
- ☒ over the window vs check
- ☐ by remit thru the mail
- ☐ by draft

e check your records and call the undersigned at 558-2252 to arrange for
change.

king you in advance for your prompt attention to this matter, we remain.

Very truly yours,

Shearson, Hammill & Co., Incorporated

Thomas Goetz
Supervisor - Cash Control

Thomas Goetz

BEST COPY AVAILABLE

EXHIBIT "C"
MICROFILMS OF FIVE CERTIFICATES

ILLEGIBLE

EXHIBIT "D"
PHOTOSTAT FROM THE ORIGINAL
RECEIPT NUMBER 350821

SHEARSON, HAMMILL & CO.
INCORPORATED - FOUNDED IN 1902
CUSTOMER SERVICE CENTER
RECEIPT 80 PINE STREET - NEW YORK, N. Y. 10005

No. 350821

OFFICES IN PHILADELPHIA AND FROM COAST TO COAST
TELEPHONE 212-558-2333

THE ATTACHED SECURITIES ARE DELIVERED AGAINST PAYMENT

IF PERMITTED TO BE RETAINED TEMPORARILY FOR THE PURPOSE OF VERIFICATION THEREOF IN TRUST FOR SHEARSON, HAMMILL & CO., INC. UNTIL PAID FOR, TITLE TO THESE SECURITIES REMAINS WITH SHEARSON, HAMMILL & CO., INC. UNTIL PAYMENT HAS BEEN RECEIVED IN FULL. IN THE CASE MAY BE, UNTIL PAYMENT HAS BEEN RECEIVED IN FULL BY SHEARSON, HAMMILL & CO., INC. FOR ITS OWN ACCOUNT OR AS AGENT FOR OTHERS. AS THE CASE MAY BE.

QUANTITY	DESCRIPTION	SECURITY NO.	PRICE	TRADE DATE
300	DOCUMENT SYSTEMS 1/16	10347		06-18-1 06-25-1

ACCOUNT NO. 793-2930-1-58

SAMUEL H. SLOAN & CO.
RECEIVED SUBJECT TO CORRECTION AND EXAMINATION
SAM SLONE
120 LIBERTY ST
NEW YORK NY 10005

RECEIVED BY

EXHIBIT "E"
LETTER DATED DECEMBER 30, 1971

December 30, 1971

Mr. Sam H. Slone
Sam Slone & Co.
122 Liberty Street
New York, New York

Dear Mr. Slone:

Various documentation has been brought to my attention substantiating our claim against you for 500 shares of Docutel Corporation.

As explained to you in prior conversation and correspondence we delivered to you in error on June 25, 1971, 500 shares of Docutel Corporation. This delivery was in error since our trade with you settling June 25, 1971 was for 500 shares Document System for a net amount of $31.25.

Docutel Corporation is currently selling for $21.00 per share and although we have made due demand to you to return the shares erroneously delivered, you have not as yet complied therewith.

In view of the aforementioned, please forward to my attention within the next seven days, 500 shares of Docutel Corporation, or the cash in lieu (approximately $10,000) to cover the cost of a Buy In.

If I do not hear from you within the next seven days, I shall have no alternative but to take whatever legal action I may deem necessary.

Very truly yours,

Bernard Kesselman

BK:js
cc: Walter Lamb

APPENDIX "D"
UNDERTAKING ON ATTACHMENT

Hartford Accident and Indemnity Company
Hartford, Connecticut

SUPREME COURT—NEW YORK COUNTY

SHEARSON, HAMMILL & CO. INCORPORATED,

Plaintiff

-against-

SAMUEL H. SLOAN & HARRY G. THEODOS, co-partners, d/b/a SAMUEL H. SLOAN & CO.,

Defendant

WHEREAS, Shearson, Hammill & Co. Inc. the above named Plaintiff having applied to one of the Justices of this Court, for an order of attachment against the property of the above named Defendant Samuel H. Sloan & Harry G. Theodos, co-partners, d/b/a Samuel H. Sloan & Co. under and by virtue of the provisions of the Civil Practice Law and Rules in such cases made and provided.

NOW, therefore, the Hartford Accident and Indemnity Company, of Hartford, Connecticut, a Connecticut corporation, having an office and place of business at 123 William Street, New York, State of New York, does hereby undertake and become bound in the penal amount of Two Thousand Five Hundred and 00/100 ($2,500.00) Dollars, of which amount the sum of One Thousand Two Hundred Fifty and 00/100 ($1,250.00) Dollars, as fixed by the Court, thereof is conditioned that the Plaintiff shall pay to

the Defendant all legal costs and damages which may be sustained by reason of the attachment if the Defendant Samuel H. Sloan & Harry G. Theodos, co-partners, d/b/a Samuel H. Sloan & Co., recovers judgment or it is finally decided that the Plaintiff was not entitled to an attachment of the Defendant's property, and the balance thereof or One Thousand Two Hundred Fifty and 00/100 ($1,250.00) Dollars, is conditioned that the plaintiff shall pay to the sheriff all of his allowable fees.

Dated at New York, New York
this 19th day of January, 1972.

HARTFORD ACCIDENT AND
INDEMNITY COMPANY
By s/Grace C. Barrett
GRACE C. BARRETT
Attorney in Fact

APPENDIX "E"
ORDER TO SHOW CAUSE DATED FEBRUARY 11, 1972 ON MOTION TO VACATE ORDER OF ATTACHMENT

At a Special Term, Part II of the Supreme Court of the State of New York, held in and for the County of New York, at 60 Centre Street, New York, New York, on the 10th day of February, 1972.

Present: Hon. George M. Carney
Justice

SHEARSON, HAMMILL & CO., INC.,

Plaintiff,

-against-

SAMUEL H. SLOAN and HARRY G. THEODOS, as Co-Partners doing business under the firm name of SAMUEL H. SLOAN & CO.,

Defendants.

On the annexed affidavit of Samuel H. Sloan, duly sworn to February 10, 1972, and on all of the papers and proceedings heretofore had and filed herein, including the following papers: order of attachment herein dated February 2, 1972, and papers submitted in support of the application therefor and the summons and complaint,

Let the plaintiff and the Sheriff of the City of New York, County of New York, show cause at a Special Term, Part I of this Court, to be held on the 11th day of February, 1972,

at 9:30 A.M. of said day or as soon thereafter as counsel can be heard, at 60 Centre Street, New York, New York, why an order should not be made, pursuant to CPLR 6223, vacating the said order of attachment herein dated February 2, 1972, on the grounds that plaintiff has no cause for conversion of action, that irremedial hardship is caused to defendant and that defendant has the unqualified right to have the dispute arbitrated by the New York Stock Exchange or, in any event, modifying said attachment order so as to reduce the amount of the attachment on the ground that the plaintiff as a matter of law cannot recover the money damages claimed, and granting such similar, other, further and different relief as may be just in the premises

Sufficient cause appearing, let service of a copy of this order and annexed affidavit on the attorney for the plaintiff and on the Sheriff of the City of New York, County of New York, by leaving same at their respective offices, be good and sufficient if made on or before 5:30 P.M. February 10, 1972.

Enter,

s/G.M.C.
J.S.C.

Filed February 10, 1972

APPENDIX "F"
AFFIDAVIT OF SAMUEL H. SLOAN
DATED FEBRUARY 10, 1972 IN SUPPORT
OF MOTION TO VACATE ORDER OF ATTACHMENT

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

SHEARSON, HAMMILL & CO., INC.,

Plaintiff,

-against-

SAMUEL H. SLOAN and HARRY G. THEODOS, as Co-Partners doing business under the firm name of SAMUEL H. SLOAN & CO.,

Defendants.

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

SAMUEL H. SLOAN, being duly sworn, deposes and says:

That he is the sole proprietor of Samuel H. Sloan & Co. and is the defendant in this action brought by Shearson, Hammill & Co., Inc., the plaintiff herein.

The defendant is a dealer in securities, operating in a very limited manner and buys and sells securities only from other broker-dealer, and does not trade with the public. The plaintiff is one of the three largest retail securities dealers in the nation and deals directly with the public, and is a member of the New York Stock Exchange.

The plaintiff has secured an Order of Attachment for

$12,500 on the basis that I convert securities having a value of $12,500 and on February 4, 1972 attached my bank account at Chemical Bank. I first learned of such attachment on February 8, 1972. At the time of such attachment my said account contained the sum of $12,054.00, which is all the liquid capital invested in my business. In the event said Order of Attachment is not vacated or substantially modified, I shall be forced to go out of business at once.

I have been advised by my attorney that in motions of this type the Court does not decide the merits of the dispute and gives plaintiff the benefit of all legitimate inferences and deductions which may be drawn from facts alleged. I seek to vacate the Order of Attachment on the basis that no conversion occurred. The effect of the Order of Attachment works an irremediable hardship upon me, and the New York Stock Exchange is the proper forum to arbitrate this dispute. In the alternative, I seek to modify the Order of Attachment on the basis that $12,500 is not the true measure of plaintiff's damages.

NO CONVERSION OCCURRED

The plaintiff maintains that on June 25, 1971 it mistakenly delivered to me 500 shares of Docutel Corp. ("Docutel") instead of 500 sares of Document Systems, Inc. ("Document"). At that time I was a market maker in both securities, being listed in the "pink sheets", and brought and sold both securities freely. Attached hereto and marked Exhibit "I" is my check dated June 25, 1971 payable to the order of plaintiff in the sum of $31.25, representing the purchase price for 500 shares of Document. This check or the proceeds thereof have never been returned to me by plaintiff.

Plaintiff has previously advised me of its alleged mistake and I advised them I could not ascertain from my books and records that they had in fact delivered to me 500 shares

of Docutel. 500 shares of Docutel was not a unique item in my business, for I was a market maker in that stock and bought and sold shares from my inventory. I asked plaintiff for proof of the fact that I had mistakenly received 500 shares of Docutel instead of 500 shares of Document but they produced none despite the fact that their cashier came to my office to discuss this matter with me. The first time I had seen plaintiff's "proof" was when I was given a copy of the affidavit and exhibits in support of plaintiff's application for the Order of Attachment. Plaintiff's Exhibit "C" is barely legible since it is a photocopy of a photocopy but assuming that it is what it purports to be, it does not reasonably demonstrate that I mistakenly received 500 shares of Docutel rather than 500 shares of Document. Nothing prevented an employee of the plaintiff from substituting 500 shares of Document for the 500 shares of Docutel shown in plaintiff's Exhibit "C" after the film was taken but before delivery of the securities to me.

It is evident that plaintiff is missing 500 shares of Docutel. Some employee has made a serious mistake involving a large sum of money for which he will be held responsible unless responsibility can be affixed to some third party.

Deponent has no intention to deprive plaintiff of its property without payment. Deponent never wanted 500 shares of Docutel from plaintiff. If 500 shares of Docutel were delivered by plaintiff to defendant, it was a mistake, and if defendant placed the 500 shares of Docutel into his inventory of Docutel shares, it was also a mistake. I never wrongfully or wilfully took or disposed of 500 shares of Docutel. Under such circumstances, there can be no conversion, and a basis for the Order of Attachment does not lie under CPLR Section 6201(6)(7). Plaintiff has recognized this and has set forth a second cause of action for Unjust Enrichment in its verified complaint.

Plaintiff maintains that by Exhibit "E" it has formally demanded return of 500 shares of Docutel. This letter was

never received by your deponent. The addressee is misnamed and the address is incorrect. Your deponent's name and address is Samuel H. Sloan, 120 Liberty Street, not Sam H. Slone, 122 Liberty Street.

THE GRANTING OF THE ORDER OF ATTACHMENT WORKS AN IRREDEEMIBLE HARDSHIP.

The plaintiff claims that 500 shares of Docutel were mistakenly delivered to me on June 25, 1971. Since that date the price of said stock has had a meteoric rise, as shown by exhibits attached and referred to herein subsequently. The plaintiff has waited seven months to take any legal action. The plaintiff now attempts to punish me for its mistake and also take advantage of the height of the market for Docutel shares. Plaintiff's punishment of defendant is more than attempting to recover a sum of money, it is punitive. All my liquid capital is in the bank account attached by the Sheriff. Checks have been drawn against my account. Unless these funds are made available to me, I shall be unable to meet my current obligations and shall be forced out of business. Because of plaintiff's actions I shall be forced to lose my business, without the opportunity of having this dispute decided on the merits by a trier of the facts. Even if I am vindicated at a trial, it will be a Phyrric victory. I appeal to the Court in its discretion to vacate the Order of Attachment and permit me to have my day in court.

THE NEW YORK STOCK EXCHANGE IS THE PROPER FORUM TO ARBITRATE THIS DISPUTE.

The plaintiff, as a member of the New York Stock Exchange, has agreed to be bound by its rules. Annexed as Exhibit "2" is Article VIII Section 1. I have this date requested the New York Stock Exchange, as a non-

member, to take jurisdiction of this matter and resolve the dispute under its arbitration rules.

THE ATTACHMENT SHOULD BE REDUCED

Annexed hereto as Exhibit "3" are price quotations for Docutel (and also show that Samuel H. Sloan & Co. was a market marker). At or about June 25, 1971, the date plaintiff alleges it mistakenly delivered Docutel shares to me, Docutel was approximately $10 per share. It basically remained in this price range until the middle of September, 1971. Plaintiff must be deemed to have knowledge of the fact that they mistakenly delivered to me 500 shares of Docutel on June 25, 1971 for they allege their records so indicate. This is also confirmed at a somewhat later date, August 11, 1971, by plaintiff's Exhibit "B". I never agreed to return any Docutel shares to plaintiff. I sold no Docutel shares later than July 30, 1971 and thereafter discontinued making a market for Docutel shares. Even assuming plaintiff's theory as to the measure of damages is correct, the highest price reached by Docutel within a reasonable time after the alleged conversion is approximately $10 per share.

By its Exhibit "E" plaintiff indicated it would "Buy In" Docutel shares, a specific procedure under the rules of the National Association of Security Dealers, Inc. Evidently, this was never done. Plaintiff does not allege that it ever actually purchased Docutel shares at $25.00 per share. In actuality, it is the practice of plaintiff in situations such as this to immediately "cover" the missing shares. Plaintiff purchased 500 Docutel shares on or about June 25, 1971 and suffered little or no real damages. On the other hand, plaintiff seeks to recover from me a sum far in excess of what I could have actually received from the sale of the said Docutel shares for I sold no Docutel shares after July 30, 1971. Accordingly, the Order of Attachment should be reduced.

No previous application has been made for any of the relief requested herein.

WHEREFORE, I respectfully request the annexed order to show cause and on return of this motion, an order vacating said attachment order, or in any event, modifying it so as to reduce it in an amount in the discretion of the court, and granting such similar, other, further and different relief as may be just in the premises.

s/Samuel H. Sloan
SAMUEL H. SLOAN

Sworn to
February 10th, 1972

		Wants	Offerings	D
DR. PEPPER CO. (Colo.) (No Par). Listed N. Y. Div. 40¢-10¢ qt. Closing price N. Y., July 30, 1971—31⅜.				
DOCTORS HOSPITAL INC. (Wash., D. C.) COM ($100)				
Tyche Secs Inc Ft Lee	7-19-71	@390		L
DOCUMENT SYSTEMS INC. (N. Y.) COM. (5 Cents).				
Samuel H Sloan & Co N Y	7-27-71	@ ⅛	@ ¼	D
DOCUTEL CORP. (Del.) COM. (10 Cents).				
RANGE 1969 42-22 1970 27½-3¼ 1971 7¾-7¾				
Dominick & Dominick S F	4- 7-71	@ 10	@ 10½	D
Scheinman Hochstein & T N Y	4-12-71	@ 9⅛	@ 9⅝	D
Olympic Secs Corp Hous	4-19-71	@ 9⅝	@ 9¾	D
Greene & Co N Y	4-26-71	@ 8⅛	@ 9	D
Schneider Bernet & H Dls	4-30-71	@ 9	@ 9⅜	D
Jefferies & Co Inc L A	6-11-71	@ 10¼	@ 10⅝	D
Singer & Mackie Inc N Y	6-29-71	@ 9⅞	@ 10¼	D
Abraham & Co N Y	7- 1-71		@ 10½	D
Samuel H Sloan & Co N Y	7- 9-71	@ 9⅜	@ 9⅝	D
Chicago Corp Chgo	7-16-71	@ 9½	@ 9⅞	D
Dominick & Dominick N Y	7-30-71	@ 7⅞	@ 8⅛	D
First of Texas Inc N Y	7-30-71	@ 8	@ 8¼	D
Institutional Equity Dls	7-30-71	@ 8	@ 8¼	D
M H Meyerson & Co Inc J C	7-30-71	@ 7⅞	@ 8¼	D
Underwood Neuhaus Hous	7-30-71	@ 7⅞	@ 8¼	D
DODGE CORK CO. INC. ($5).				
Kalb Voorhis & Co N Y	5-25-71	@ 3	@ 5	L
George A Rogers & Co N Y	7-15-71	@ 3½		D
Hornblower & Weeks H N N Y	7-23-71		@ 3½	D
Russell & Saxe J C	7-29-71	@ 3½	@ 4½	D
Hopper Soliday B S Phila	7-30-71	@ 3¾		D
Tweedy Browne & Knapp N Y	7-30-71		@ 4½	D
DODGE CORP (Ga.) COM. ($1).				
Franklin & Co N Y	5-19-71	@ ⅝		D
DODGE THIRTEENTH REALTY CO. (Clevs.) COM (No Par).				
L J Schultz & Co Clev	7-22-71	@ 70		L
DOESKIN PRODUCTS, INC. (N. Y.) COM. ($1).				
Tyche Secs Inc Ft Lee	6-15-71	@ 5⅜		L
DOLESE & SHEPARD CO ($50)				
Hickey & Co Chgo	5-24-71	@126		L
Swift Henke & Co Chgo	7-22-71	@126		L
DOLLAR ASSOCIATES INC (Cal.) COM (No Par)				
Tyche Secs Inc Ft Lee	5-21-71	@ 13⅝		L
First Calif Co S F	7-12-71	@ 14		D
DOLLAR GENERAL CORP. (Ky.) COM. (50 Cents).				
J C Bradford & Co Nash	4-21-71	@ 34¼	@ 34⅝	D
A P Montgomery & Co N Y	5-10-71	@ 34⅛	@ 34½	D
Wertheim & Co N Y	5-12-71	@ 35	@ 35⅜	D
John J Meyers & Co N Y	5-19-71	@ 33¾	@ 34¼	D
Doyle O'Connor Chgo	5-25-71	@ 34⅝	@ 35	D
Greene & Co N Y	7- 6-71	@ 34¼	@ 35¼	D
Bateman Eichler & H R L A	7-22-71	@ 39.37½	@ 39.87½	D
Doyle O'Connor & Co N Y	7-29-71	@ 40¾	@ 41⅛	D
Almstedt Brothers Lsvl	7-30-71	@ 41⅛	@ 41⅜	D
A G Becker & Co Inc N Y	7-30-71	@ 41¼	@ 41⅝	D
Edwards & Hanly N Y	7-30-71	@ 41¼	@ 41⅝	D
Usher Corp St L	7-30-71	@ 41¼	@ 41⅝	D
Robert Garrett & Son Balt	7-30-71	@ 41¼	@ 41⅝	D
Morgan Keegan & Co Inc Memp	7-30-71	@ 41¼	@ 41⅝	D
New York Hanseatic N Y	7-30-71	@ 41¼	@ 41⅝	D
Paine Webber J & C Inc N Y	7-30-71	@ 41	@ 41½	D
Robinson Humphrey Co N Y	7-30-71	@ 41	@ 41½	D
L M Rosenthal & Co N Y	7-30-71	@ 41¼	@ 41⅝	D
G A Saxton & Co Inc N Y	7-30-71	@ 41¼	@ 41⅝	D
Singer & Mackie Inc N Y	7-30-71	@ 41	@ 41⅝	D
White Weld & Co N Y	7-30-71	@ 41	@ 41½	D
Dean Witter & Co N Y	7-30-71	@ 41	@ 41½	D
DOLLAR SAVINGS & TRUST CO. (Youngstown, O.) ($10) Div. $1.60-40c qt., extra 40c 12-18-70.				
Singer Deane Scrib Pitts	5-25-71	@ 42		L
Franklin & Co N Y	5-26-71	@ 41		D
J N Russell Inc N Y	6-11-71	@ 40		L
C S McKee & Co Inc Pitts	6-23-71	@ 40		L
Mericka & Co Inc Cleve	6-25-71	@ 40		L
Simpson Emery & Co Pitts	7- 7-71	@ 37½		D
Merrill Lynch P F S N Y	7-27-71	@ 44		L
DOLLAR SAVINGS BANK CO. (New. Ohio) ($10)				
Franklin & Co N Y	4-23-71	@ 23½		D
J N Russell Inc N Y	6-11-71	@ 25		L
Carey & Duncan Inc N Y	6-23-71	@ 23		L
Mericka & Co Inc Cleve	6-25-71	@ 25		L
Dishro & Co Inc Cleve	7-22-71	@ 24		L
DOLLINGER CORP. (N. Y.)				
David E Brill Co N Y	7-26-71	@ 6		D
Monroe Secs Inc Roch	7-30-71	@ 5	@ 6½	D
Sage Rutty & Co Inc Roch	7-30-71	@ 5	@ 7	D
DOLLY MADISON INDUSTRIES INC (Del.) RANGE 1971 3-½				
Filor Bullard Smyth N Y	5-11-71		@ 2	D
Dopler Gray & Co Inc N Y	5-13-71	@ 1½	@ 1⅝	D
Carr Secs Corp N Y	6-17-71	@ 1⅝		D
Singer & Mackie Inc L A	7-22-71	@ 2¼	@ 2½	D
Wellington Hunter J C	7-26-71	@ 2¼	@ 2½	D
Replanning Sec Frmngdle	7-30-71	@ 1¾	@ 2¼	D
Eastern Securities Inc N Y	7-30-71	@ 2	@ 2½	D
T H Lehman & Co N Y	7-30-71	@ 2	@ 2½	D

—COM. ($1) Transfers Barnett National Bank, Jacksonville. Out. 2,500 shs. Div. 2¢ '1-4-66.
Block Issue—Dec. 1964 78,000 shs at $4 by Varnedoe Chisholm & Co., Inc, et al.
[illegible] Vosnos & Co N Y 5-25-71 @ 2¼ L
[illegible] Secs Jr Ft Lee 7-15-71 @ 2½ L

DIXSON, INC. (Colo.) P. O. Box 1761, Grand Junction, Colo. 81501.
—COM. ($1) Transfer Co. office. Out. 205,258 shs.
Per Charged Note 5¢ Cents to $2. Basis: 1 for 4.
[illegible] @ 1½D

DOAK PHARMACAL CO. INC. (N. Y.) 2000 Shames Dr. Westbury N. Y. 11590.
—COM. (10 Cents). Transfers Columbia Transfer Co., Syosset. Out. 502,668 shs.
New Issue—$ 60 100,000 shs at $3 by Rose Secs Inc.
[illegible] MacDaid & Co Inc Nat 4- 5-71 @ 2¾ @ 3⅛ D
[illegible] & Simpson N Y 4-[illegible]-71 @ 3⅛D
Earl Edden Co Rock Centre 4-[illegible]-71 @ 17⅜ @ 18⅜D
Gartner Bros N Y 4-[illegible]-71 @ 13⅜ @ 14⅜D
Herzog & Co Inc N Y 4-[illegible]-71 @ 13⅜ @ 14⅜D
Plymouth Secs Corp J C N J 5-[illegible]-71 @ 11⅜ @ 12⅜D

DOCKTOR PET CENTERS, INC. (Pa.) 4247 North Broad St., Philadelphia, Pa.
—COM (No Par). Transfers Continental Stock Transfer Co., J. C. Out. 1,050,000 shs.
New Issue—6-65 150,000 shs at 25 by Myron A. Lomasney & Co.
Diamond Turk & Co N Y 4-26-71 @ 3¼ @ 3⅝D
Draper Gray & Co Inc N Y 5-[illegible]-71 @ 11⅜ @ 12⅜D
Herzog & Co Inc N Y 5-[illegible]-71 @ 11⅜ @ 12⅜D
Plymouth Secs Corp J C N J 5-[illegible]-71 @ 11⅜ @ 12⅜D
Trester Singer & Co N Y 5-[illegible]-71 @ 11⅜ @ 12⅜D

DOCTOR JACK POT MINING CO. (Colo.) (Colorado Springs, Colo.).
Note—As of 8-65 under court order assets acquired by Golden Cycle Corp. and charter forfeited 10-5-65 for non payment of taxes.

DOCTOR JACK POT MINING CO. (Wyo.) (2½ Cents).
General Bond & Share [illegible]-21-71 @ .01 1 D
[illegible] Nelson Co Spokane [illegible]-21-71 @ .01 1 L

DR. PEPPER CO. (Colo.) 8523 East Mockingbird Lane, P. O. Box [illegible], Dallas, Tex. [illegible]
—(No Par). Transfers St. Louis (Mo.) Union Trust Co., Manufacturers Hanover Trust Company, N. Y. Out. 8,875,620 shs. Div. [illegible]
Public offering [illegible] Ford Co., Houston and Hill Bros., Rockford, Ill. 2,970 shs at $15 in Sept 1959.
Capital Change—3-70 shs. issued 2 for 1 split.
[illegible] Washington, D. C.
—COM ($100). Transfer Co. shares Auth. 4,000 shs.
Latest Addn Issue—9-68 Company offered 1,000 shs at $100.
Tyche Secs Inc Ft Lee [illegible] L

DOCUMENT SYSTEMS, INC. (N. Y.) 64 University Place New York, N. Y. 10003.
—COM. (5 Cents). Transfers Chemical Bank New York Trust Co., N. Y. Out. 2,856,000 shs.
New Issue—11-68 120,000 shs. at $7½ by Packer, Wilbur & Co., Inc.
J S Love & Co Inc N Y 8-16-71 [illegible] 6⅝ D
Tyche Secs Inc Ft Lee 8-31-71 @ .01 1 D

DOCUTEL CORPORATION (Del.) 2000 Stemmons Freeway, Dallas, Tex.
—COM (10 Cents) Transfers Chemical Bank New York Trust Co., N. Y. Out. 6,292,000 shs.
New Issue—1-68 425,000 shs. at $10 by Faulkner, Dawkins & Sullivan.
RANGE 1969 42-22 1970 27½-3⅛ 1971 15⅜-5⅛
Dominick & Dominick S P 4- [illegible]-71 @ 10 @ 10¼D
Scheinman Hochstein & T N Y 4-12-71 @ 9¼ @ 9⅝D
Olympic Secs Corp Hous 4-19-71 @ 9⅝ @ 9⅞D
Greene & Co N Y 4-26-71 @ 8⅝ @ 9 D
Schneider Bernet & H Dls 4-30-71 @ 9 @ 9¼D
Jefferies & Co Inc L A 5-11-71 @ 10¼ @ 10½D
Singer & Mackie Inc N Y 6-29-71 @ 9⅜ @ 10¼D
Samuel H Stein & Co N Y 7- 9-71 @ 9⅜ @ 9⅝D
Chicago Corp Chgo 7-16-71 @ 9½ @ 9⅝D
Abraham & Co N Y 8-11-71 @ 9⅝ @ 10 D
J S Love & Co Inc N Y 8-12-71 @ 9⅝ @ 10 D
M H Meyerson & Co Inc J C 8-18-71 @ 10⅞ @ 11⅜D
Underwood Neuhaus Hous 8-19-71 @ 10⅜ @ 11⅝D
L M Rosenthal & Co N Y 8-31-71 @ 14¾ @ 15⅜D
Bruns Nordeman & Co N Y 8-31-71 @ 14¾ @ 15⅜D
Bruns Nordeman & Co N Y 8-31-71 @ 14¾ @ 15⅜D
Dean Witter & Co N Y 9-14-71 @ 19 @ 19⅜D
M S Wien & Co Inc J C 9-22-71 @ 18¼ @ 18⅝D
Dominick & Dominick N Y 9-[illegible]-71 @ 20⅞ @ 21⅜D
Dempsie & Schaenen Inc N Y 9-[illegible]-71 @ 20⅞ @ 21⅜D
First of Texas Inc N Y 9-[illegible]-71 @ 20⅞ @ 21⅜D
Institutional Equity Dls 9-[illegible]-71 @ 20⅞ @ 21⅜D
Singer & Mackie Inc N Y 9-[illegible]-71 @ 20⅞ @ 21⅜D

DODGE CORK CO., INC., 11 Laurel St., Lancaster, Pa. 17604.
—COM. ($5). Out. 529,500. Transfers Co. office.
New Issue—Van Alstyne Noel & Co. Inc offered as a speculation 25,000 shares at $6.10 in April, 1964.

		Wants	Offerings	
DIXIE YARNS INC. (Tenn.)				
—COM (NO PAR).				
Div. 30¢ 9-2-71				
Leonard & Co Chat	10-28-71	25		D
DIXILYN CORP. (Dela.)				
—COM (10 CENTS).				
Listed American				
Closing price—Amer., October 29, 1971—6⅛				
DIXON (Joseph) Crucible Co (N.J.)				
—CAP ($10).				
Div. 20¢ 12-17-71 extra 15¢ 12-17-71				
27½-17½ 1970 19¼-14⅝ 1971 23½-17				
Tresler Singer & Co N Y	10-28-71	17½	18⅛	D
Outwater & Wells J Cy	10-29-71	17½	18⅛	D
Parker & Weissenborn Nwrk	10-29-71	17½	18⅛	D
Reynolds Secs Inc N Y	10-29-71	17½	18⅛	D
DIXSON, INC. (Colo.)				
—COM ($1).				
Birkenmayer & Co Inc Denv	10-29-71	4½	5½	D
DOAK PHARMACAL CO. INC. (N.Y.)				
—COM (10 CENTS).				
Bertner Bros N Y	10-29-71	1⅝	2⅛	D
Herzog & Co Inc N Y	10-29-71	1⅝	2⅛	D
Plymouth Secs Corp J C N J	10-29-71	1⅝	2⅛	D
DOCKTOR PET CENTERS, INC. (Pa.)				
—COM (NO PAR).				
Bertner Bros N Y	10-29-71	2	2½	D
Herzog & Co Inc N Y	10-29-71	2⅛	2⅝	D
Newton Investment Corp Bos	10-29-71	2⅛		D
Plymouth Secs Corp J C N J	10-29-71	2⅛	2⅝	D
Trester Singer & Co N Y	10-29-71	2⅛	2⅝	D
DOCTOR JACK POT MINING CO. (Wyo.)				
—(2½ CENTS).				
R E Nelson Co Spokane	10-26-71	01		L
DR. PEPPER CO. (Colo.)				
—(NO PAR).				
Listed New York				
Div. 40¢ 10¢ qt				
Closing price—N Y, October 29, 1971—32⅛				
DOCUMENT SYSTEMS, INC. (N.Y.)				
—COM (5 CENTS).				
Listed National				
DOCUTEL CORPORATION (Dela.)				
—COM (10 CENTS).				
RANGE—1969 42-22 1970 27½-3⅛ 1971 22⅝-5⅛				
Dominick & Dominick N Y	10-7-71	21⅛	21⅝	D
Dean Witter & Co N Y	10-12-71	20⅝	21⅛	D
First of Texas Inc N Y	10-29-71	19⅝	19⅞	D
Institutional Equity Dls	10-29-71	18⅝	19⅛	D
Singer & Mackie Inc N Y	10-29-71	19	19⅜	D
DODGE CORK CO., INC.				
—COM ($5).				
Universal Secs Corp Birm	10-27-71	3¼	4¼	D
DODGE LAND CO. (Calif.)				
—($100).				
Tyche Secs Inc Ft Lee N J	10-22-71	⅛		L
DODGE THIRTEENTH REALTY CO. (Ohio)				
—COM (NO PAR).				
L J Schultz & Co Clev	10-19-71	125		L
DOLESE & SHEPARD CO.				
—($50).				
Div. $2 7-27-62				
Swift Hirsch & Co Chgo	NO 20 71	126		L
Hickey & Co Chgo	10-26-71	126		L
DOLLAR ASSOCIATES INC. (Calif.)				
—COM (NO PAR).				
First Calif Co S F	10-20-71	14		L
DOLLAR GENERAL CORPORATION (Ky.)				
—COM (50 CENTS).				
Paine Webber J & C Inc N Y	10-6-71	37⅛	38⅛	D
Dean Witter & Co N Y	10-12-71	38⅛	38¾	D
G A Saxton & Co Inc N Y	10-18-71	36⅛	36⅝	D
A G Becker & Co Inc N Y	10-21-71	35	35⅝	D
Arnstedt Bros Louisville	10-25-71	34⅛	34½	D
Doyle O'Connor & Co N Y	10-25-71	34	34⅝	D
Edwards & Hanly N Y	10-25-71	34⅛	34⅝	D
Francis Corp St Louis	10-29-71	33⅞	34	D
Jefferies & Co Dls	10-29-71	34	34⅜	D
Merrill Lynch Pfs N Y	10-29-71	33⅞	34	D
Morgan Keegan & Co Inc Mem	10-29-71	33⅞	34	D
New York Hanseatic N Y	10-29-71	33⅞	34	D
Robinson Humphrey Co N Y	10-29-71	33⅞	34	D
Singer & Mackie Inc N Y	10-29-71	33⅞	34⅛	D
Wertheim & Co N Y	10-29-71	33⅞	33⅞	D
White Weld & Co N Y	10-29-71	33⅞	34	D
DOLLAR SAVINGS & TRUST CO. (Youngstown, Ohio)				
—($10).				
Div. $1.60 40¢ qt. extra 40¢ 12-18-70				
Simpson Emery & Co Pitts	10-6-71	40		D
Hemblower & Wks Hn N Y	10-26-71		46	D
Aviello Griffin Trmbr Pitts	10-29-71	42		D
DOLLAR SAVINGS BANK CO. (Niles, Ohio)				
—($10).				
Disbro & Co Inc Cleve	10-21-71	23		L
DOLLINGER CORP. (N.Y.)				
—COM (50 CENTS).				
Div. 7½¢ 3-19-70				
Monroe Secs Inc Roch	10-26-71	3¼	3¼	D
Sage Rutty & Co Inc Roch	10-29-71	6	8	D
DOLLY MADISON INDUSTRIES INC. (Dela.).				
—COM ($1).				
Div. 5% stk 2-16-70, 48¢-12¢ qt.				
RANGE—1971 3-1⅝				
Eastern Securities Inc N Y	10-29-71	1½	1⅝	D
T H Lehman & Co N Y	10-29-71	1½	1⅝	D
McKinley Investment Tulsa	10-29-71	1½	1⅝	D
G A Saxton & Co Inc N Y	10-29-71	1½	1⅝	D
Sherwood Secs Corp N Y	10-29-71	1½	1⅝	D
Singer & Mackie Inc N Y	10-29-71	1½	1⅝	D
Trester Singer & Co N Y	10-29-71	1½	1⅝	D
M S Wien & Co Inc J Cy	10-29-71	1¼	1½	D
DOLLY VARDEN MINES, LTD. (B.C.)				
—(50 CENTS).				
Listed Vancouver				
Carr Secs Corp N Y	10-13-71	½	½	D
Tyche Secs Inc Ft Lee N J	10-13-71	20	40	D
R J Ozol & Co Linden N J	10-20-71	28		D
M H Meyerson & Co Inc J Cy	10-29-71	20	28	D
DOLPHIN PAINT & CHEMICAL CO.				
—CLASS A (NO PAR); Redeemable $27½.				
Div. $2 12-5-57 not accum.				
Brukenfeld Mitchell & Co N Y	10-20-71	11		L
—CLASS B (10 CENTS).				
Brukenfeld Mitchell & Co N Y	10-20-71	⅝		L
DOMAIN INDUSTRIES, INC. (Wisc.)				
—COM ($1).				
Div. 12½¢ 1-31-66				
RANGE—1969 23¼-14⅛ 1970 17½-8 1971 13⅛-9				
Tyche Secs Inc Ft Lee N J	10-21-71	6		D
Merrill Lynch Pfs N Y	10-29-71	8½	9	D
Piper Jaffray & Hop N Y	10-29-71	8½	9	D
DOMAN HELICOPTERS, INC. (Dela.)				
—COM (10 CENTS).				
Carr Secs Corp N Y	10-21-71		05	D
Plymouth Secs Corp J C N J	10-28-71		04	D
E L Aaron & Co Inc N Y	10-29-71	01		D
DOMAN INDUSTRIES LTD.				
PFD ($10).				
Listed Vancouver				
—COM (NO PAR).				
Listed Vancouver				
Div. 2½¢ 1-17-72				
—WARRANTS.				
Listed Vancouver				
DOME MINES, LTD (Canada)				
—COM (NO PAR).				
Listed Toronto, New York				
Div. 80¢ 20¢ qt extra 10¢ 2-15-66 less tax				
Closing price—N Y, October 29, 1971—53				
DOME PETROLEUM, LTD. (Canada)				
($2.50).				
Listed American, Montreal, Toronto				
Closing price—Amer., October 29, 1971—28½				
DOMESTIC AIR EXPRESS, INC. (Dela.)				
—COM (1 CENT).				
RANGE—1969 42-16, 1970 20-2½, 1971 12½-2½				
G A Saxton & Co Inc N Y	10-1-71	2¾	3	D
Stetson Secs Corp Fairfld	10-25-71		2	D
Mayer & Schweitzer Inc N Y	10-27-71	1½	2	D
Staten Is Secs Statenis	10-28-71		2	D
Brukenfeld Mitchell & Co N Y	10-29-71	1½	1⅝	D
Johnson Kean & Co Phil	10-29-71	1¾	1¾	D

BEST COPY AVAILABLE

APPENDIX "G"
AFFIDAVIT OF WALTER E. LAMB
DATED FEBRUARY 11, 1972 IN OPPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

SHEARSON, HAMMILL & CO., INC.,

Plaintiff,

-against-

SAMUEL H. SLOAN and HARRY G. THEODOS, as Co-Partners doing business under the firm name of SAMUEL H. SLOAN & CO.,

Defendants.

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

WALTER E. LAMB, being duly sworn, deposes and says:

That he is a cashier at Shearson, Hammill & Co., Inc. the plaintiff in the within action and submits this affidavit based upon personal knowledge and information as well as documents and records in his possession and under his control. This affidavit is submitted in opposition to the defendant's motion to vacate the attachment authorized by an Order of this Court.

Your deponent has read the affidavit of Armand Zerilli, which was submitted in support of the plaintiff's application for an attachment, and the affidavit of Samuel H. Sloan, submitted in support of the defendant's order to show cause to vacate the attachment herein.

Deponent's affidavit will supplement the factual situation correctly set forth in Mr. Zerilli's affidavit and will show the many glaring errors in the affidavit submitted by Mr. Sloan.

Shearson, Hammill & Co., Inc., in the normal course of its business, has established a procedure, although not required to do so, of microfilming every security that leaves the house. Annexed hereto as Exhibit "A" are photostats of the five (5) microfilmed Certificates, each for one hundred (100) shares of common stock of Docutel Corporation, the subject matter of this lawsuit.

The Court will note that the first of these Certificates has stapled to it a slip in the lower left hand corner, which we refer to as the delivery unit. The delivery unit shows an order for 500 shares of Document Systems. The Certificate, #N-9046 is clearly for Docutel Corporation. Since the names were so close it is apparent how this error was made. However, as the defendant admits the value of Document Systems on June 25, 1971 was only 1/16th or a total value of $31.25 for 500 shares. The defendant admits that it did, in fact, order 500 shares of Document Systems and did not order Docutel Corporation.

We call the Court's attention to the five (5) Certificate numbers: N-9046, N-9047, N-9048, N-11287 and N-11454. The documentary evidence presented by this and other exhibits will clearly show that the hypothesis set forth in Mr. Sloan's affidavit is unequivocally denied by the facts of this case.

During the course of our intra-office investigation late in July of 1971, we first learned of the erroneous delivery of Docutel stock. It was as a result of our microfilm investigation, and subsequent check of our delivery unit receipts, that we learned the 500 shares were delivered to Samuel H. Sloan & Co.

Annexed hereto as Exhibit "B" is a copy of the delivery unit receipt showing the stamp of Samuel H. Sloan & Co. Since we have had little or no dealings with the defendant as a broker, we erroneously recorded his name as "Sam Slone", but as the Court can see, "Sam Slone" and Samuel H. Sloan & Co. is one and the same and our error is merely academic.

Exhibit "B" indicated above has numerous identifying numbers which coincide with the numbers on the delivery unit stapled to Certificate N-9046, which is a part of Exhibit "A".

After learning of the error persons in my office contacted Mr. Sloan and also sent a form letter dated August 11, 1971 indicating the erroneous delivery with the identifying Certificate numbers. A copy of this form letter is annexed hereto as Exhibit "C". The persons in my office who communicated with Mr. Sloan were unable to procure the erroneously delivered Certificates.

On Friday, December 17, 1971, I personally stepped into this picture by visiting the offices of Samuel H. Sloan & Co. I spoke to a man who refused to give me his name, but denied that he was Sam Sloan. I told him of the error and he said that Mr. Sloan would be back in the afternoon. I called Mr. Sloan in the afternoon and once again he was informed of the erroneous delivery. He *did not* request any documentation from us proving the erroneous delivery. He merely stated that he would check it out and see if he had it, which customer it was transferred to, and he would try to obtain re-delivery.

Naturally, I did not hear from Mr. Sloan but continued my investigation and learned that the five (5) Certificates in question were all transferred by Samuel H. Sloan & Co. to First of Texas, Inc. I contacted First of Texas and they confirmed that they purchased the 500 shares in question from Samuel H. Sloan. Annexed hereto as Exhibit "D" are photostatic copies of First of Texas stationery acknowledging receipt of the 500 shares of Docutel Cor-

poration and indicating the exact same Certificate numbers as indicated in Exhibit "A". Further, the receipt indicates that the name on the Certificates were all Shearson, Hammill & Co. Inc.

The affidavit of Bernard Kesselman fully sets forth what occurred after the completion of my investigation. Shearson Hammill, contrary to what Mr. Sloan says in his affidavit, did not buy-in the 500 shares of Docutel in June of 1971, and did, in fact, sustain a great loss. The 500 shares of Docutel Corporation were purchased by Shearson, Hammill at 26 7/8 per share for a total cost of $13,614.70. Annexed hereto as Exhibit "E" is the proof of such purchase.

The amount alleged in the complaint as damage for the plaintiff herein is only $12,500, based upon a lower price of the same securities earlier in the month of January 1972.

WHEREFORE, I respectfully request this Court to deny the motion of the defendant in all respects.

s/Walter E. Lamb
WALTER E. LAMB

Sworn to
February 11th, 1972

APPENDIX "H"
AFFIDAVIT OF BERNARD KESSELMAN DATED FEBRUARY 11, 1972 IN OPPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

SHEARSON, HAMMILL & CO., INC.,

Plaintiff,

-against-

SAMUEL H. SLOAN and HARRY G. THEODOS, as Co-Partners doing business under the firm name of Samuel H. Sloan & Co.,

Defendants.

STATE OF NEW YORK)
COUNTY OF NEW YORK 0 ss.:

BERNARD KESSELMAN, being duly sworn deposes and says: That he is an attorney at law admitted to practice in the State of New York and in the legal department of the plaintiff firm, Shearson, Hammill & Co. Inc. This affidavit is based on personal knowledge and information, as well as documents and records. The affidavit is submitted in opposition to defendant's application to vacate the attachment in this action.

Deponent has read the affidavits of Armand Zerelli, Samuel H. Sloan and Walter E. Lamb. Your deponent respectfully refers the Court to all the documents and papers originally submitted on plaintiff's application for the attachment herein and respectfully requests that it be incorporated in its entirety in this motion.

The facts are fully and accurately stated in the affidavits of Armand Zerelli and Walter E. Lamb. Deponent personally wrote to Samuel H. Sloan, as indicated by my letter of December 30, 1971. This letter constituted a demand on our part for return of five hundred (500) shares of Docutel Corporation or payment of the value thereof. The defendant did not respond to this letter, and never requested documentary proof of the erroneous delivery. The letter is annexed hereto as Exhibit "F". This letter was marked Exhibit "E" on plaintiff's application for the attachment.

Annexed hereto as Exhibit "G" is a photostatic copy of the postal receipt signed by the defendant Samuel H. Sloan, unequivocally showing receipt by the defendant of your deponent's letter.

As indicated in the affidavit of Mr. Lamb, the plaintiff did buy-in, but at 26 7/8 per share, for a total cost of $13,614.70. This amount exceeds even the amount demanded in the complaint herein.

The affidavit of Samuel Sloan is obviously fallacious and is contradicted by the facts as set forth above.

WHEREFORE, your deponent respectfully requests this Court to deny the defendant's motion in all respects.

s/ Bernard Kesselman
BERNARD KESSELMAN

Sworn to
February 11th, 1972

APPENDIX "I"
AFFIRMATION OF IRVING SEROTA
DATED FEBRUARY 11, 1972

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

SHEARSON, HAMMILL & CO., INC.

Plaintiff,

-against-

SAMUEL H. SLOAN and HARRY G. THEODOS,
as Co-Partners doing business under
the firm name of SAMUEL H. SLOAN & CO.,

Defendants.

STATE OF NEW YORK)
COUNTY OF NEW YORK)

Irving Serota, an attorney at law, duly admitted to practice in the State of New York, and associated with Leibowitz & Platzer, the attorneys for the plaintiff in the within action submits the following affirmation under penalties of perjury, pursuant to CPLR.

The undersigned is fully familiar with the facts and circumstances set forth herein from all documents and records in our file and numerous conferences with various representatives of the client.

The undersigned has read the affidavits of Armand Perilli, Walter E. Lamb, Bernard Kesselman and Samuel H. Sloan. All the facts in this case are fully set forth in plaintiff's representatives affidavits. All the documentary

evidence annexed hereto and to the requisite papers submitted on plaintiff's representatives affidavits. All the documentary evidence annexed hereto and to the requisite papers submitted on plaintiff's application for an attachment clearly show that the affidavit of Samuel Sloan is fallacious, and except for the few admissions, no credence should be given to any part of his affidavit. The defendant vacillated between positions and alleged contradictory "facts".

First, he stated that the plaintiff bought-in 500 shares of Docutel on or about June 25, 1971 and suffered no loss, and then he admitted that plaintiff's exhibits showed that the plaintiff did not buy-in. He asked this Court not to charge him at the price the plaintiff bought-in. This is clearly an admission that the plaintiff suffered a great loss and he does not want that loss passed on to him.

He stated in his affidavit they never received the letter of December 30, 1971, yet plaintiff's Exhibit "G" clearly shows his own signature on the receipt of the certified letter. The Court need only look at the signature on the confirmation of the sale, which was marked Exhibit "A" on plaintiff's application for attachment.

The defendant by its own action, or inaction, caused the plaintiff to purchase at a much higher price. Mr. Sloan misrepresented to Mr. Lamb and others that he would investigate the matter and would attempt to obtain the securities. The defendant herein admits that he was told of the error, yet he took no steps to ascertain whether or not he honestly received and transferred the 500 shares of Docutel. Just as we discovered that First of Texas Inc. purchased the 500 shares of Docutel from Sloan, the defendant, more easily, could have discovered this.

If the defendant wishes to be equitable, as he alleges in his affidavit, why did he do nothing after the numerous conversations in the summer of 1971, after the notice of August 11, 1971, after the personal conversations with Mr.

Lamb, and others, in December 1971 and after totally ignoring plaintiff's letter of December 30, 1971.

Now, he piously comes before This Court and on page 3 of his affidavit says he has no intention of depriving the plaintiff of its property, without payment. It is the plaintiff that has been seriously wronged by the conversion of the defendant. The defendant had ample opportunity to amicably settle this matter, but when he is faced with the attachment of his bank account, he pleads to this Court that he will suffer irreparable damage. Yet the Court will note that Mr. Sloan admits that the amount attached is all the liquid capital invested in his business. If this attachment is vacated, it is the plaintiff who will be irreparably damaged, because no judgment may be satisfied, if the plaintiff should recover in the trial of this action. To quote the defendant's own words, "it will be a Phyrric victory" for the plaintiff.

In addition, the defendant has ample remedy to avoid any alleged irreparable damage, by obtaining a Bond, sufficient to cover the amount attached, plus the Sheriff's fees. The defendant, it is submitted, has waived his right to plead irreparable damage at this late stage and is estopped by his own lack of action from coming before this Court and attempting by emotion to obtain that which he cannot obtain by legal means.

As this Court well knows, the burden is heavily on the defendant attempting to vacate an attachment, to show that the plaintiff *must* lose upon the trial of this action.

Furthermore, under Section 6233, he must also show that the plaintiff absolutely does not need the security of the attachment before the final disposition of the case.

The Court is respectfully referred to all of the cases cited under Notes 12, 15, 18, 23 and 24 of Section 6223, CPLR, including the Pocket Parts.

Pursuant to New York law the plaintiff has to show in his complaint a prima facie case against defendant. The Court

will not carefully scrutinize the complaint to make absolutely certain that the plaintiff must prevail in order to sustain the attachment. Indeed the law is just the opposite. It is defendant who must show that plaintiff cannot win even after all the presumptions are deemed favorable to the plaintiff.

The undersigned submits to this Court that based upon all the documentary evidence and all the papers that the plaintiff has more than shown a prima facie case for conversion, as well as unjust enrichment against the defendant.

In addition to the facts being erroneously stated in Mr. Sloan's affidavit, he has also mis-stated the law. Scienter, or wrongful intent is not a necessary element in the Civil action for conversion. The unauthorized assumption and exercise of the right of ownership of the plaintiff's goods, detrimental to the plaintiff's rights, is the conversion, and by demand, the plaintiff establishes a prima facie case for conversion, if the goods are not returned, or payment made thereof.

The facts conclusively show that multiple notices of plaintiff's ownership of the 500 shares of Docutel stock were brought home to the defendant and due demand was made of him. The stock was purchased within a reasonable time after the seven (7) days elapsed, which were accorded to the defendant in the plaintiff's demand letter of December 30, 1971.

Even the argument for an arbitration is not sufficient to vacate the attachment. As this Court well knows, an attachment may stand and all proceeding in the Supreme Court may be stayed while the arbitration proceeds. The attachment is merely for security, while the arbitration is merely a procedure for trying the issues of fact.

It appears even from the defendant's own affidavit that his financial position is rather shaky, and it would certainly defeat the very purpose of Section 6201(6), if the at-

tachment were vacated in this matter. The plaintiff having shown a prima facie case for conversion has a right pursuant to this Section to an attachment for security purposes. The plaintiff will agree to a prompt trial or will immediately prepare necessary motion papers for summary judgment so that this matter will be conclusively decided within the near future. However, as indicated before, if the attachment is vacated at this time, the plaintiff may be irreparably damaged. Legally, the defendant has totally failed to sustain his burden of showing any right whatsoever to have this Court vacate the attachment and to have a second Judge review the very facts upon which the first Judge saw fit to grant the attachment in the first place.

WHEREFORE, the undersigned respectfully requests this Court to deny this motion in all respects and to allow the attachment to stand, unless the defendant posts the appropriate Bond.

s/Irving Serota
IRVING SEROTA

Dated: February 11. 1972

APPENDIX J—Order (Lupiano, J.) Dated Feb. 23, 1972 denying motion to vacate

SUPREME COURT OF THE STATE OF NEW YORK, SPECIAL TERM PART I, NEW YORK COUNTY, at the Courthouse thereof, 60 Centre Street, New York City 7, New York.

Present: Hon. VINCENT A. LUPIANO,
Justice.

SHEARSON, HAMMILL & CO., INC.

-against-

SAMUEL H. SLOAN, et ano, et al

FILED
Feb. 23, 1972
NEW YORK
County Clerk's Office

The following papers numbered 1 to 24 read on this motion
ARGUED

PAPERS NUMBERED

FILED Order to Show Cause
Exhibits and Affidavits Annexed 1-14
Answering Affidavits & Exhibits 15-23

* * *

Filed Papers Order of attachment 24

Upon the foregoing papers this Motion by defendant for an order vacating the attachment authorized by a prior order of this court is denied. The documentary evidence and all the papers submitted herein by plaintiff demonstrate a cause of action for conversion, as well as unjust enrichment against the movant, warranting the attachment for security purposes. Defendant has ample remedy to avoid any alleged irreparable damage by obtaining a bond

sufficient to cover the amount attached, plus the sheriff's fees. This motion is denied in all respects and the subject attachment is allowed to stand, unless the defendant posts the appropriate bond.

Dated Feb. 17, 1972

s/ V.A.L.
J.S.C.

Briefs: Plaintiffs... Defendant's ... Petitioner's ... Respondent's ... Relator's ... Briefs .....

County Clerk's No. 1321, 1972
Spec I Liber 325 Line 8 1972

APPENDIX K—Decision (Starke, J.) dated April 6, 1972

SUPREME COURT OF THE STATE OF NEW YORK, SPECIAL TERM PART I, NEW YORK COUNTY at the Courthouse thereof. 60 Centre Street, New York, New York, 10007.

Present: Hon. GEORGE STARKE,
Justice.

Shearson, Hammill & Co., Inc.,

-against-

Samuel H. Sloan et ano, etc.

The following papers numbered 1 to 14 read on this motion submitted No. 129 on Calendar of Mar. 23-1972

PAPERS NUMBERED

Notice of Motion Pleadings
and Exhibits and Affidavits Annexed 1-9
Supplemental Affidavit
& exhibit 10-11
Answering Affidavit & Exhibits 12-14

***

Upon the foregoing papers defendants move for an order staying the prosecution of this action and compelling arbitration of the controversy between the parties. Plaintiff does not deny that as a member of the New York Stock Exchange, bound by its constitution, controversies of the sort at issue herein are arbitrable under that constitution. However plaintiff urges that defendants have waived their right to arbitrate. This action was commenced in February 1972 and defendant interposed an answer, which did not assert that right; moved to vacate or modify the attachment heretofore obtained by plaintiff and served a demand for a bill of particulars.

The general rule is that service of an answer which does not raise a claim for arbitration does not, alone, constitute a waiver of the right to arbitrate (See *Short v. National Sport Fashions*, 264, App Div 284) even when followed by other preliminary activities in the litigation (*Matter of Haupt v. Rose*, 265 N.Y. 108) where no affirmative relief is sought in the litigation by the party seeking arbitration (*G.H. & T.H. Kelly, Inc. v. Lorson Electric Co.*, 51 Misc 2d 655), where the activities in the litigation are not otherwise indicative of an intent to waive that right and where arbitration is promptly sought. None of defendants activities herein in the short period since commencement of the action evidence an intent to waive the right to arbitrate. The instant motion was fairly promptly made and defendants sought no affirmative relief in their answer. Accordingly the motion is granted. Settle order.

Dated APR 6 1972

s/ GS
J.S.C.

Briefs: Plaintiff's x Defendant's x Petitioner's ... Respondent's ... Relator's ... Briefs .....

County Clerk's No. 1321, 1972
Spec I Liber S46 Line 7, 1972

APPENDIX L—Order Dated April 19, 1972 staying action and directing plaintiff to proceed to arbitration

AT a Special Term, Part I, of the Supreme Court of the State of New York, held in and for the County of New York, at 60 Center Street, New York, New York on the 19 day of April, 1972.

PRESENT: HON. GEORGE STARKE,

Justice.

SHEARSON, HAMMILL & CO., INC.,

Plaintiff,

-against-

SAMUEL H. SLOAN and HARRY G. THEODOS, as Co-Partners doing business under the firm name of SAMUEL H. SLOAN & CO.,

Defendants.

Index No. 1321/72

ORDER

The plaintiff, Samuel H. Sloan, by his attorney, Roy L. Weiss, having duly moved for an order pursuant to CPLR 7503(a) directing that the action instituted by plaintiff be stayed and that the controversy in all respects proceed to arbitration by the New York Stock Exchange, and the Order of Attachment previously obtained by plaintiff be vacated upon the ground that plaintiff as a member of the New York Stock Exchange is bound by its rules and regulations to arbitrate a dispute with a non-member at the insistence of the non-member, and said motion having regularly come on to be heard;

NOW, upon reading and filing the Notice of Motion dated March 13, 1972, the affidavit of Samuel H. Sloan, sworn to March 13, 1972, with the exhibits annexed

thereto, and the affirmation of Roy L. Weiss, dated March 21, 1972, in support of the motion, and the affirmation of Irving Sorota dated March 21, 1972, with the exhibits annexed thereto, in opposition thereto, and upon submission by Roy L. Weiss, Esq., counsel for defendant Samuel H. Sloan, in support of said motion, and Leibowitz & Platzer, Esqs., counsel for plaintiff, in opposition thereto, and after due deliberation having been held thereon and it appearing to the satisfaction of the Court that the dispute is subject to arbitration by the New York Stock Exchange;

NOW, upon motion of Roy L. Weiss, attorney for defendant Samuel H. Sloan, it is

ORDERED, that the motion be and the same is hereby in all respects granted, and that plaintiff Shearson, Hammill & Co. Inc. be and is hereby directed to proceed to arbitration by the arbitration facilities of the New York Stock Exchange of its dispute with Samuel H. Sloan with respect to the matters set forth in plaintiff's complaint and the Order of Attachment dated February 2, 1972; and it is further

ORDERED, that the action instituted by plaintiff be stayed.

ENTER,

s/ GS
J.S.C.

APPENDIX M—Order (Gellinoff, J.) dated July 12, 1972

***

Present: HON. ABRAHAM J. GELLINOFF,

Justice.

Shearson, Hammill & Co. Inc.

-against-

Samuel H. Sloan etc.

The following papers numbered 1 to ... read on this motion, submitted

PAPERS NUMBERED

Notice of Motion-Exhibits and Affidavits Annexed ..1-9

Answering Affidavit & Exhibits 10-12

***

Filed Papers Special Term Order McCarthney, J. dated 2/2/72 13

Motions Papers & Order Lupiano, J. dated 2/17/22 .14

Motion, in effect, for reargument is respectfully referred to Mr. Justice Lupiano.

s/ AJG
J.S.C.

County Clerk's No. 1321, 1972
Spec I Liber S105 Line 6, 1972

APPENDIX N—Order (Lupiano, J.) dated July 24, 1972

***

Present: HON. VINCENT A. LUPIANO,

Justice.

Shearson, Hammill & Co. Inc.

-against-

Samuel H. Sloan etc.

The following papers numbered 1 to ... read on this motion submitted No. 116 on Calendar of July 7, 1972

PAPERS NUMBERED

Notice of Motion-Exhibits and Affidavits Annexed .....
Answering Affidavit & Exhibits 10-12

***

Order of Reference 15
Filed Papers Special II Order McCaffey J. dated 2/2/72 13
Motion papers, & Order Lupiano J. dated 2/17/72 ..14

Upon the foregoing papers this Motion by defendant for an order directing that the order of attachment dated February 2, 1972 be vacated or, in the alternative, that plaintiff's undertaking be increased, is respectfully re-referred to Mr. Justice Gellinoff. The instant motion is one seeking relief previously sought in part on prior application to the court which resulted in an order dated February 17, 1972. However, since such prior application and disposition, a different state of facts has arisen, to wit, the order of this court dated April 19, 1972, staying the instant action and directing plaintiff to proceed to arbitration. Accordingly, the instant motion is not in effect one for reargument or to renew, but rather a new motion.

VAL
J.S.C.

Dated July 24, 1972
County Clerk's No. 1321, 1972
Spec I Liber S105 Line 6, 1972

FILED
AUG 4-1972
NEW YORK
CO. CLERK'S OFFICE

APPENDIX O—Decision (Gellinoff, J.) dated August 4, 1972

SUPREME COURT OF THE STATE OF NEW YORK, SPECIAL TERM PART I, NEW YORK COUNTY at the Courthouse thereof, 60 Centre Street, New York, New York, 10007.

Present: Hon. ABRAHAM J. GELLINOFF,

Justice.

Shearson Hammil & Co. Inc.

-against-

Samuel H. Sloan etc.

The following papers numbered 1 to ... read on this motion, submitted No. 116 on Calendar of July 7, 1972

PAPERS NUMBERED

Notice of Motion-Exhibits-and Affidavits Annexed ..1-9

Answering Affidavit & Exhibits 10-12

***

Filed Special II Order McCaffrey J. bated 2/2/72 13

Filed Motion Papers & Order Lupiano J. dated 2/17/72 14

Order of Reference to Mr. Justice Lupiano 15

Order of Referral to Mr. Justice Gellinoff 16

Upon the foregoing papers this Motion to vacate attachment is denied upon condition that plaintiff commence the arbitration proceedings directed by the order of April 19, 1972, within 20 days after service of a copy of this order with notice of entry.

Should plaintiff fail to timely commence the proceedings, defendant, through counsel, may renew this motion.

Dated 8/4/72

AJG
J.S.C.

Spec I Liber S105 Line 6, 1972

APPENDIX P—Consent to change attorney dated August 29, 1972

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

SHEARSON HAMMILL AND COMPANY, INC.,

Plaintiff,

-against-

SAMUEL H. SLOAN and HARRY G. THEODOS as Copartners doing business under the firm name of SAMUEL H. SLOAN AND COMPANY,

Defendants.

Index No. 1321/1972

IT IS HEREBY CONSENTED THAT Samuel H. Sloan, defendant in person of No. 120 Liberty Street N.Y., N.Y. be substituted as attorney of record for the undersigned party in the above entitled action in place and stead of the undersigned attorney as of the date hereof.

Dated: August 21, 1972

s/ Roy L. Weiss
Roy L. Weiss

s/ Samuel H. Sloan
Samuel H. Sloan and Company
By s/ Samuel H. Sloan

FILED
AUG 29 1972
NEW YORK
CO. CLERK'S OFFICE

STATE OF NEW YORK)
COUNTY OF NEW YORK)ss.:

On the 25th day o' August, 1972, before me personally came Samuel H. Slo: n to me known, and known to me to be the same person described in and who executed the foregoing consent :nd acknowledged to me that he executed the same.

s/ Marie C. Blasi
MARIE C. BLASI
Notary Public, State of New York
No. 31-0313900
Qualified in New York County
Commission Expires March 30, 1973

APPENDIX Q—Order (Postal, J.) dated August 31, 1972

SUPREME COURT OF THE STATE OF NEW YORK, SPECIAL TERM, PART I, NEW YORK COUNTY at the Courthouse thereof, 60 Centre Street, New York, New York, 10007.

Present: Hon. GEORGE POSTAL

Justice.

Shearson, Hammill & Co., Inc.,

-against

Samuel H. Sloan, etc.,

The following papers numbered 1 to 6 read on this motion,
SUBMITTED No. 188 on Calendar of AUG 31 1972

PAPERS NUMBERED

Filed Order to Show Cause—and Affidavits Annexed Exhibits 1-4

Answering Affidavit Exhibit 5-6

* * *

Defendant's motion for an order vacating plaintiff's order of attachment is granted unless the plaintiff commences arbitration, as is required by the orders of this court, on or before October 5, 1972.

Dated SEP 21 1972

GP
J.S.C.

County Clerk's No. 1321, 1972
Spec I Liber S149 Line 9, 1972

FILED
SEP 22 1972
NEW YORK
CO CLERK'S OFFICE

APPENDIX R—Decision (Dickens, J.) dated December 14, 1972

SUPREME COURT OF THE STATE OF NEW YORK, SPECIAL TERM PART I, NEW YORK COUNTY at the Courthouse thereof, 60 Centre Street, New York, New York, 10007.

Present: Hon. THOMAS DICKENS

Justice.

SHEARSON, HAMMIL & CO., INC.,

-against-

SAMUEL H. SLOAN, et ano

The following papers numbered 1 to 10 read on this motion, submitted

PAPERS NUMBERED

Notice of Motion-and Affidavits Annexed 1-3

Answering Affidavit and Exhibits 4-10

***

Upon the foregoing papers this Motion for an order amending complaint is granted to the extent of dropping Harry G. Theodos as a party defendant. In all other respects the motion is denied. Settle order.

Dated Dec. 20, 1972 s/ TD
J.S.C.

County Clerk's No. 1321, 1972
Spec I Liber S198 Line 2, 1972

APPENDIX "S"
ORDER DATED OCTOBER 4, 1973

At a Special Term, Part I, of the Supreme Court of the State of New York, held in and for the County of New York, at 60 Centre Street, New York, New York, on the 4th day of October 1973.

PRESENT: HON. THOMAS DICKENS
Justice.

SHEARSON, HAMMIL & CO., INC.,

Plaintiff,

-against-

SAMUEL H. SLOAN and HARRY G. THEODOS, as Co-Partners doing business under the firm name of SAMUEL H. SLOAN & CO.,

Defendants.

A motion having been made by the defendant Samuel H. Sloan above named for an order pursuant to CPLR 1003 dropping Harry G. Theodos as a party defendnat, and amending the complaint herein by striking out his name as a defendant on the grounds that Harry G. Theodos is not a partner in Samuel H. Sloan & Co. and for an order pursuant to CPLR 3211 (a) dismissing the action for lack of subject matter jurisdiction on the grounds that this action is being arbitrated by the New York Stock Exchange Board of Arbitration and is as such subject to the exclusive jurisdiction of the U.S. District Courts and the said motion having duly come on to be heard.

Now on reading and filing the notice of motion dated the 30th day of November, 1972, with proof of due service thereof, the affidavit of Samuel H. Sloan, sworn to the day of November 30th, 1972, in support of said motion and the affirmation of Sydney G. Platzer, attorney for plaintiff in opposition thereto dated December 8, 1972 it is

ORDERED that the same motion be granted to the extent of dropping Harry G. Theodos as a party defendant and that the caption is herein amended to read as follows:

SHEARSON, HAMMILL & CO., INC.,

Plaintiff,

-against-

SAMUEL H. SLOAN d/b/a
SAMUEL H. SLOAN & CO.,

Defendant.

---

and that this motion is in all other respects denied and it is further ordered that a copy of this order be served upon the clerk of the court who is directed to mark his records to reflect the change of caption herein.

Enter,

s/ J.D.
J.S.C.

Filed October 5, 1973

APPENDIX "T"
DECISION (CARNEY, J.)
DATED NOVEMBER 30, 1973

COUNTY OF NEW YORK

SHEARSON, HAMMILL & CO., INC.

-against-

SAMUEL H. SLOAN, et ano, etc.

PRESENT: HON. GEORGE CARNEY,
Justice.

Notice of Motion and Affidavits, annexed, exhibits, papers numbered 1-7.

Upon the foregoing papers this Motion for an order reducing damages and removing action to Civil Court is denied. The amount of damages, if any, to which plaintiff is entitled cannot be ascertained with exactitude at this stage of the proceedings but must instead await the pending arbitration.

s/G.M.C.
J.S.C.

Filed November 30, 1973

Dated November 21, 1973

Filed November 8, 1973

APPENDIX "U"
DEFAULT ORDER AND JUDGMENT CONFIRMING ARBITRATION AWARD

At a Special Term, Part I, of the Supreme Court of the State of New York, County of New York, held at the Courthouse, 60 Centre Street, New York, New York, on the 4th day of April 1974.

PRESENT: HON. PETER A. QUINN,
Justice.

In the Matter
of
An Arbitration of Certain Controversies Between
SHEARSON, HAMMILL & CO., INC.

Petitioner,

-and-

SAMUEL H. SLOAN and SAMUEL H. SLOAN & CO.,

Respondents.

Upon Petitioner's Notice of Petition dated March 1, 1974 for confirmation of an arbitration award in its favor and for entry of judgment thereon, the Petition of Shearson, Hammill & Co., Incorporated dated March 1, 1974 and Exhibits "A", "B", and "C" annexed thereto, including the submission to arbitration dated February 13, 1973, and the award of the arbitrators dated February 14, 1974 and acknowledged February 14, 1974, and there being no appearance in opposition, and there being good and sufficient reason appearing from the Petition that

judgment should be awarded to Petitioner, it is

ORDERED, that the Motion to confirm the arbitrators' award not to enter judgment thereon is granted; and it is further

ORDERED, that the award of the arbitrators in favor of the Petitioner and against the Respondents in the sum of Eleven Thousand, Fifteen and 56/100 ($11,015.56) Dollars, and the dismissal of the counterclaim entered in the arbitration, and the assessment of One Hundred Twenty ($120.) Dollars costs against the Respondents, is hereby confirmed, and it is further

ADJUDGED, that the Petitioner, Shearson, Hammill & Co., Inc. having its principal place of business at 80 Pine Street, New York, New York, recover from Respondents Samuel H. Sloan and Samuel H. Sloan & Co., residing at and having a principal place of business at 120 Liberty Street, New York, New York, the sum of Eleven Thousand, Fifteen and 56/100 Dollars, with interest thereon from the 14th day of February, 1974, in the sum of Four Hundred Sixteen and 72/100 ($416.72) Dollars, and a further sum of One Hundred Twenty ($120.0) Dollars representing costs of the arbitration proceeding, together with costs and disbursements as taxed in the sum of Ten ($10.00) Dollars, making in all the sum of Eleven Thousand Four Hundred Forty Two and 28/100 ($11,442.28) Dollars, and that the Petitioner have execution therefor.

ENTER
s/P.A.Q.
J.S.C.

APPENDIX "V"
ORDER TO SHOW CAUSE
DATED MARCH 29, 1973
ON MOTION TO OPEN THE DEFAULT JUDGMENT AND OTHER RELIEF

At a Special Term Part II of the Supreme Court of the State of New York, held in and for the County of New York at 60 Centre Street, New York, N.Y. on the 29th day of March, 1974.

Present: Hon. NATHANIEL T. HELMAN
Justice

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

SHEARSON, HAMMILL & CO., INC.,

Plaintiff,

-against-

SAMUEL H. SLOAN d/b/a
SAMUEL H. SLOAN & CO.,

Defendants.

On the annexed affidavit of Samuel H. Sloan, duly sworn to March 28, 1974 and all the papers and proceedings heretofore had and filed herein and the summons and complaint,

Let the plaintiff show cause at a Special Term, Part I of this Court to be held on the 4th day of April, 1974 at 9:30 A.M. or as soon thereafter as counsel can be heard, at 60

Centre Street, New York, N.Y., why an order should not be made (1) to open the default judgment on a motion to confirm an arbitration award made returnable on the 15th day of March 1974 and to deny the motion on the grounds of (A) failure to effect proper service of the moving papers and (B) fraud upon the Court; (2) why an order should not be made to dismiss the claim for (A) lack of subject matter jurisdiction pursuant to CPLR 3211(a)(1), (B) lack of personal jurisdiction due to the failure to effect service pursuant to CPLR 403, (C) fraud or misconduct on the part of an adverse party, (D) the cause of action may not be maintained because of arbitration and award pursuant to CPLR (A)(5), (E) the parties to the lawsuit are different than the parties to the arbitration; and (3) why an order should not be made pursuant to CPLR 7511 vacating or modifying the arbitration award on the grounds of (A) fraud or misconduct in procuring the award, (B) false testimony of the witnesses at the arbitration hearing, (C) the arbitrators exceeded their authority and have awarded upon a matter not submitted to them by the Court, (D) failure to follow a procedure of article 75 of CPLR, (E) the award is imperfect as a matter of form and (F) the arbitrators so imperfectly executed their authority that the award they rendered could not have been based upon a proper determination of the facts and the law at issue and the award arrived at appears to have been a number chosen almost at random.

Sufficient cause appearing therefore, let service of a copy of this order and the annexed affidavit on the attorney for the Plaintiff by leaving same at their respective offices be good and sufficient if made on or before 5:30 P.M. on the 1st day of April, 1974.

Enter,

s/N.T.H.
J.S.C.

APPENDIX "W"
AFFIDAVIT OF SAMUEL H. SLOAN
DATED MARCH 28, 1974 IN SUPPORT

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

SHEARSON, HAMMILL & CO., INC.,

Plaintiff,

-against-

SAMUEL H. SLOAN d/b/a
SAMUEL H. SLOAN & CO.,

Defendant

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

Samuel H. Sloan, being duly sworn, deposes and says:

1. He makes this affidavit in support of a motion to open the default and deny the motion on a motion to confirm an arbitration award returnable on March 15, 1974 and in support of a motion to dismiss the complaint, and to vacate or modify the arbitration award.

2. No prior application has been made to open the default on a petition to confirm an arbitration award returnable March 15, 1974.

3. On March 22, 1974 the attorneys for the Plaintiff served upon the telephone answering service of the deponent a proposed order and judgment with a notice of entry returnable March 26, 1974 a copy of which is attached hereto and marked Exhibit A.

4. This proposed order and judgment is an attempt to defraud the Court in that the caption is incorrect. The action bearing the index number 1321/1972 was commenced under the following caption:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

SHEARSON, HAMMILL & CO., INC.,

Plaintiff,

-against-

SAMUEL H. SLOAN and HARRY G. THEODOS,
as co-partners doing business under the
name of Samuel H. Sloan & Co.,

Defendants.

A copy of the original complaint is attached hereto and marked Exhibit B. On June 4, 1973 by an order of the Hon. Thomas Dickens, the caption was amended to the present caption.

5. The plaintiff is attempting to perpetrate a fraud upon this Court by making this action appear to be a special proceeding. In reality, this is an action for a sum of money only. The summons and complaint make no reference to an arbitration award. The action was commenced more than two years before the arbitration hearing was held.

6. Deponent was never served with a petition to confirm an arbitration award. Instead, it appears from the papers on file with the Court that the Plaintiff served the petition upon deponents former attorney, Robert W. Taylor, Esq. However, Taylor represented Sloan exclusively in ar-

bitration and administrative proceedings. Sloan has appeared in person in the instant action and has made four motions pro se over a two year period. The Plaintiff is fully aware that Taylor does not represent Sloan in any action before the Supreme Court of the State of New York.

7. Deponent has obtained from Taylor a letter which Taylor sent to the attorneys for the Plaintiff in which Taylor makes it clear that he does not represent Sloan. A copy of this letter is attached hereto and marked Exhibit C.

8. Nevertheless, the Plaintiff did not withdraw its motion but let it go to default in an effort to defraud the Court. A copy of the notice of motion and the moving affidavit, as taken from the papers filed with the Court, is attached hereto and marked Exhibit D. These papers also contain a fraudulent caption.

9. When deponent learned of this he immediately wrote a letter to Judge Quinn and sent a copy to the attorney for the Plaintiff to inform the Court of these facts. A copy of the letter is attached hereto and marked Exhibit E.

10. Deponent did not receive any response to that letter from the attorneys for the Plaintiff. However, deponent was informed by Judge Quinn's law clerk that defaulted motions to confirm an arbitration award are decided by the clerk at Special Term, Part I and the Judge never sees the moving papers.

11. Deponent examined the papers on file at Special Term, Part I and located the decision on the motion, a copy of which is attached hereto and marked Exhibit F.

12. This decision was obtained by fraud in that the caption to the action was fraudulent and the service was fraudulent. For these reasons the default should be opened and the action should be dismissed. There are, however, other grounds for dismissal of the complaint including other frauds perpetrated by the Plaintiff.

13. The history of his case is as follows: On February 4, 1972 a summons and complaint was served upon the

deponent. The complaint alleged that the defendant had converted securities belonging to the Plaintiff. In particular, the complaint alleged that on June 18, 1971 the Plaintiff had sold the Defendant 500 Document Systems Inc. at 1/16 for a total of $31.25 and that on June 25, 1971 it had erroneously delivered 500 Docutel Corp. The complaint further alleged that on December 30, 1971 the Plaintiff had demanded the return of the securities from the Defendant and that as a result of the failure of the defendant to return said securities the Plaintiff was obliged to purchase the securities in the open market which it did on January 31, 1972, and thereby suffered damages in the amount of $12,500.

14. Through affidavits submitted in support of various motions and testimony at the arbitration hearing it developed that on July 20, 1971 the Plaintiff claimed to have first learned of the erroneous delivery as a result of an internal box count and that the Plaintiff claimed to have notified the defendant of that fact by telephone the same day and in writing by a letter dated August 11, 1971. The significance of this was that on July 30, 1971 Docutel Corp. was selling for 8 1/4 while on December 30, 1971 it was selling for 20 and in late January, 1972 it was selling for 25. Thus, if the Plaintiff had liquidated the damages when they first learned of them the damages would have amounted to about $4,000.00 rather than $12,500.00. Also the Plaintiff alleged that the Defendant has sold the 500 Docutel Corp. on July 13, 1971 to First of Texas, Inc. and received payment in the amount of $4,762.50 and that First of Texas, Inc. had resold these identical securities bearing the same certificate numbers back to the Plaintiff for an undisclosed sum. Therefore, the ultimate ownership of the securities in question did not change in that Shearson continued to own them.

15. It would appear to the deponent from these allegations that an action for conversion would not lie and that the representation that this constituted conversion was

APPENDIX "W"
EXHIBIT "E"
LETTER TO JUDGE QUINN
DATED MARCH 18, 1974

Samuel H. Sloan
120 Liberty Street
New York, N.Y. 10006
(212) 227-5816

March 18, 1974

Hon. Peter A. Quinn
Supreme Court of the State of N.Y.
60 Centre Street
New York, N.Y.

Re: Shearson, Hammill & Co., Inc. v. Sloan
Index No. 1321/1972 #153 on
Calendar of Special Term Part I
for Friday March 15, 1974

Dear Judge Quinn:

As a result of a conversation with my former attorney Robert W. Taylor, Esq. I am informed that he is in receipt of motion papers in the matter referred to above. I wish to inform the Court that Mr. Taylor does not represent me in any matter before the New York State Courts. In the instant action I am appearing in person and have appeared as such on four previous motions over a two year period. The opposing party is fully aware that Mr. Taylor does not represent me. I submit that by serving papers upon him the opposing party is attempting to perpetrate a fraud upon this Court.

On the afternoon of March 15, 1974, after I had learned of this pending motion, I went to the office of the clerk at Special Term Part I. There I learned from the calendar

clerk that the motion had been marked default.

I do not have the moving papers of the plaintiff and I cannot respond to them. No attempt has been made to serve them upon me. In any event, I feel that the Supreme Court of the State of New York cannot confirm an arbitration award rendered by the New York Stock Exchange because only the U.S. District Courts have subject matter jurisdiction. (See Ware v. Merrill, Lynch, Pierce, Fenner & Smith, Inc. decided by the U.S. Supreme Court Dec. 12, 1973, also see 15 U.S.C. 78aa). In addition, the rules of the New York Stock Exchange Board of Arbitration do not conform to Article 75 of the CPLR.

It has been my intention to move to vacate the arbitration award on the grounds of CPLR 7511(b)(1)(i) "fraud or misconduct in procuring the award" as well as on other grounds.

However, I have first asked the arbitration to modify their award pursuant to CPLR 7509.

Accordingly, I ask that this Court deny the motion and dismiss the petition to confirm the arbitration award on the grounds of (1) lack of proper service and (2) lack of subject matter and jurisdiction. When and if the motion is properly made I will respond to it accordingly.

Very truly yours,

Samuel H. Sloan
Defendant pro se
120 Liberty Street
New York, N.Y.

TO: Liebowitz & Platzer, Esq.
ATtorneys for Shearson, Hammill & Co. Inc.
299 Broadway
New York, New York

APPENDIX "X"
ANSWERING AFFIRMATION OF SYDNEY G. PLATZER
DATED APRIL 17, 1974

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

SHEARSON, HAMMILL & CO., INC.,

Plaintiff,

-against-

SAMUEL H. SLOAN d/b/a SAMUEL H. SLOAN & wco.,

Defendants.

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

SYDNEY G. PLATZER, an attorney-at-law, duly admitted to practice in the State of New York, and a member of the firm of Leibowitz, Platzer & Feinberg, the attorneys for the plaintiff herein, submits the following affirmation under the penalties of perjury pursuant to the CPLR.

1. Samuel H. Sloan, defendant in the instant action, either by counsel or personally, has made a series of motions demanding arbitration in the instant action. The action was commenced by an order of attachment and the service of a summons and complaint. Thereafter, defendant, by his attorney, Roy L. Weiss, made a motion wherein he sought arbitration between the parties. The Honorable George Starke granted said motion and directed arbitration. Annexed hereto as plaintiff's Exhibit "A" is a

copy of the memo decision together with a copy of the order directing arbitration. Defendant, by several other motions, sought to enforce and compel prompt arbitration of the matter between the parties.

2. It would appear by the procedures followed by defendant's counsel and the defendant, who later appeared pro se, that defendant selected arbitration as the forum to be heard. Clearly, he is now estopped from contesting the validity of the arbitration proceeding or the jurisdiction of the New York Stock Exchange when he in fact selected that forum to decide the controversy between the parties.

3. Defendant apparently discharged his first attorney and appeared pro se and instituted multiple motions on his own behalf.

4. When it came time to proceed with the arbitration proceeding directed by this Court, he retained Robert W. Taylor to represent him in the arbitration proceeding. Annexed hereto as plaintiff's Exhibit "B" is a copy of the submission to arbitration duly executed by all parties hereto. The Court is respectfully referred to the signature page wherein the defendant "requests that all communications be sent to their counsel Robert W. Taylor, Esq., 160 Broadway, New York, New York". Mr. Taylor appeared on behalf of Mr. Sloan and actually tried the matter before the arbitrators. It is respectfully submitted that Mr. Taylor cannot appear in the matter and then simply "disappear" when it comes time to confirm the arbitration award. There was an exchange of correspondence between Mr. Taylor and the undersigned. Annexed hereto as plaintiff's Exhibit "C" are copies of all correspondence with respect to confirmation of the award. Your affirmant takes the position that Mr. Taylor was the proper party to serve with the petition to confirm the award. If Mr. Taylor desired to be relieved from the matter, he should have proceeded by application to this Court to be relieved or, in the alternative, a substitution of attorney should have been forwarded to counsel for plaintiff.

5. Certainly, Mr. Sloan will not deny that he actually had notice of the petition to confirm. Mr. Taylor advised your affirmant that he delivered the papers to Mr. Sloan. In any event, Mr. Sloan has certainly appeared in this matter at this time and has asserted any theories he may have contrary to the confirmation of the arbitration award. It is respectfully submitted that none of these theories have any merit. They represent the efforts of a non-attorney to demonstrate a superficial reading without depth of analysis.

6. The allegations of fraud during the arbitration proceeding constitute an effort to obtain a "second bite of the apple". Every litigant would be in a position to refute a decision rendered against him by merely stating everyone lied but me, if we are to accept this theory.

7. Defendant's claim that this Court lacks jurisdiction to confirm the arbitration award, is erroneous. What defendant has done is selected an excerpt from a case which indicates that securities litigation under the Securities Act of 1933 must be decided in the Federal Courts. The underlying subject matter of this arbitration (see submission) lies in conversion and fraud but is not, in any way, founded on violations of Federal Security Statutes.

8. Annexed hereto as plaintiff's Exhibit "D" is a copy of the arbitration award and it is respectfully submitted that this award is in proper form and does comply with the requirements of the CPLR.

9. Further, annexed hereto as plaintiff's Exhibit "E" is a copy of the petition which underlies the judgment sought to be vacated by the defendant. It is respectfully requested that this petition be considered at this time in response to the order to show cause before this Court.

Dated: New York, New York
April 17, 1974.

Sydney G. Platzer

EXHIBIT "B"
SUBMISSION TO ARBITRATION

October 3, 1972

New York Stock Exchange
Arbitration Director
11 Wall Street
New York, New York
Attention: Edward E. Morris, Jr.

Re: Shearson, Hammill & Co., Incorporated
vs. Samuel H. Sloan doing business
as Samuel H. Sloan & Co.

Gentlemen:

Pursuant to an order of the Honorable George Starke, dated the 19th day of April, 1972, and entered in an action between the above-mentioned parties in the Supreme Court of the State of New York, this submission to arbitration is being tendered by our firm on behalf of our client, Shearson, Hammill & Co., Incorporated. The facts of the situation in controversy are, as follows:

On June 18, 1971, Samuel H. Sloan & Co., a broker dealer, purchased from Shearson, Hammill & Co., Incorporated 500 shares of Document System Inc. at 1/16th for a total purchase price of $31.25, with a settlement date of June 25, 1971. On the settlement date, Shearson, Hammill & Co., Incorporated erroneously delivered to Samuel H. Sloan & Co. 500 shares of Docutel Corp. The error was caused due to a similarity in corporate names. The value of Docutel was substantially higher than Document System Inc.

Immediately after the discovery of the error, Samuel H. Sloan & Co. was notified and that firm agreed to check their records and return the erroneously delivered securities. Samuel H. Sloan procrastinated and delayed the

return of the erroneously delivered securities.

Subsequently, Shearson, Hammill & Co., Incorporated learned and received documentary evidence that the certificates in question totalling 500 shares of Docutel Corp. were sold by Samuel H. Sloan & Co. to First of Texas Inc. When it became apparent, on about December 30, 1971, that the respondent, Samuel H. Sloan & Co., was unwilling or unable to return the erroneously delivered securities and had in fact willfully appropriated them to his own use, demand for payment was made.

The value of the securities at the time of demand was approximately $12,500. and when the securities were subsequently bought in by our client, Shearson, Hammill & Co., Incorporated, the purchase price was $13,614.70. Further, our client has incurred to date counsel fees of an indeterminate amount and reasonably expects that total counsel fees will be incurred to our firm in excess of $5,000 and, therefore, our client has been damaged by the acts of Samuel H. Sloan & Co. in the total estimated amount of $18,614.70.

We enclose herewith documents to support our client's contentions, as follows:

1. Copies of the certificates delivered to Samuel H. Sloan & Co.;

2. Copy of a delivery receipt by Samuel H. Sloan for 500 shares of Document System Inc.; and

3. Copies of confirmation of First of Texas Inc. for the sale of 500 shares of Document System, Inc. by Samuel H. Sloan. (The same shares bearing the same certificate numbers were delivered to Samuel H. Sloan in error. See Exhibit "1" above.

On behalf of our client, Shearson, Hammill & Co., Incorporated, we respectfully request arbitration in regard to the foregoing claims.

We enclose herewith our client's check in the amount of $120.00 representing the required arbitration fee.

Very truly yours,

LEIBOWITZ, PLATZER & FINEBERG

By: s/Sydney G. Platzer
Sydney G. Platzer

SGP/ti
Enclosures

cc. Samuel H. Sloan & Co.
120 Liberty Street
New York, New York

Roy L. Weiss, Esq.
475 Fifth Avenue
New York, New York

Robert W. Taylor, Esq.
160 Broadway
New York, New York

EXHIBIT D—Decision of the Arbitrators

NEW YORK STOCK EXCHANGE, INC.

In the Matter of the Arbitration Between
SHEARSON, HAMMILL & CO. INCORPORATED,
CLAIMANT

-and-

SAMUEL H. SLOAN and SAMUEL H. SLOAN & CO.,
RESPONDENT

DECISION

We, the undersigned, being a majority of the arbitrators selected to hear and determine a matter in controversy between the above-mentioned claimant and respondent set forth in a submission to arbitration signed by the parties on January 9, 1973 and February 13, 1973 respectively;

And having heard and considered the proofs of the parties, have decided and determined that in full and final settlement of the above matter, respondent shall pay to claimant the sum of $11,015.56.

And further have decided and determined that the counterclaim of respondent be and hereby is dismissed;

That the costs, $120.00, be and hereby are assessed against respondent.

s/ Robert M. Flanagan
s/ Salvatore Saladian
s/ Robert B. Alfonine
s/ Hunter Egenbrick, Jr.
s/ John C. Stoddard

New York, New York
February 14, 1974

STATE OF NEW YORK) SS.:
COUNTY OF NEW YORK)

On this 14th day of February, 1974, before me personally appeared Robert M. Flanagan to me known and known to me to be the individual described in and who executed the foregoing instrument, and he duly acknowledged to me that he executed the same.

s/ Faith E. Carney
FAITH E. CARNEY
Notary Public, State of New York
No. 03-0573225
Qualified in Bronx County
Commission Expires March 30, 1975

STATE OF NEW YORK) SS.:
COUNTY OF NEW YORK)

On this 14th day of February, 1974, before me personally appeared Robert B. Chamine to me known and known to me to be the individual described in and who executed the foregoing instrument, and he duly acknowledged to me that he executed the same.

s/ Faith E. Carney
FAITH E. CARNEY
Notary Public, State of New York
No. 03-0573225
Qualified in Bronx County
Commission Expires March 30, 1975

STATE OF NEW YORK) SS.:
COUNTY OF NEW YORK)

On this 14th day of February, 1974, before me personally appeared Hunter Goodrich, Jr. to me known and known to me to be the individual described in and who executed the foregoing instrument, and he duly acknowledged to me that he executed the same.

s/ Faith E. Carney
FAITH E. CARNEY
Notary Public, State of New York
No. 03-0573225
Qualified in Bronx County
Commission Expires March 30, 1975

STATE OF NEW YORK) SS.:
COUNTY OF NEW YORK)

On this 14th day of February, 1974, before me personally appeared Salvatore Saladini to me known and known to me to be the individual described in and who executed the foregoing instrument, and he duly acknowledged to me that he executed the same.

s/ Faith E. Carney
FAITH E. CARNEY
Notary Public, State of New York
No. 03-0573225
Qualified in Bronx County
Commission Expires March 30, 1975

STATE OF NEW YORK) SS.:
COUNTY OF NEW YORK)

On this 14th day of February, 1974, before me personally appeared John E. Stoddard to me known and known to me to be the individual described in and who executed the foregoing instrument, and he duly acknowledged to me that he executed the same.

s/ Faith E. Carney
FAITH E. CARNEY
Notary Public, State of New York
No. 03-0573225
Qualified in Bronx County
Commission Expires March 30, 1975

EXHIBIT E—PETITION FOR JUDGMENT CONFIRMING ARBITRATION AWARD

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

In the Matter
of
An Arbitration of Certain Controversies Between
SHEARSON, HAMMILL & CO., INCORPORATED,
Petitioner,

-and-

SAMUEL H. SLOAN and SAMUEL H. SLOAN & CO.,
Respondents.

Index Number 1321/72

Petitioner, SHEARSON, HAMMILL & CO., INCORPORATED, respectfully shows and alleges:

1. Petitioner is a corporation duly organized under the laws of the State of Delaware and authorized to do business in the State of New York, with principal offices in the County of New York. Petitioner is a broker-dealer registered with the Securities & Exchange Commission and is a member of the New York Stock Exchange.

2. Upon information and belief, Respondent SAMUEL H. SLOAN resides in the City, County and State of New York, and Respondent SAMUEL H. SLOAN & CO. is doing business as a broker-dealer in the City, County and State of New York.

3. That heretofore and on or about the 2nd day of February, 1973, Petitioner obtained an Order of Attachment and commenced an action in the instant Court against Respondents.

4. That thereafter and on or about the 13th day of March, 1972, Respondents made a motion returnable the 23rd day of March, 1972 demanding an order staying

proceedings and to co npel arbitration between the parties. Said motion was gi anted and an order duly entered compelling arbitratio 1. A copy of said order is annexed hereto as EXHIBIT 'A".

5. Arbitration was compelled pursuant to Article VIII, Section 1, of the C nstitution of the New York Stock Exchange, which pr vides:

> "Any controver y between parties who are members, allied members, member firms or member corporat ions shall, at the instance of any such party, and any controversy between a non-member and a member or allied member or member firm or member corporation arising out of the business of such member, allied member, member firm or member corporation, or the dissolution of a member firm or member corporation, shall, at the instance of such non-member, be submitted for arbitration, in accordance with the provisions of the Constitution and the rules of the Board of Directors."

A copy of the arbitration Article of the Constitution of the New York Stock Exchange is annexed hereto as EXHIBIT "B".

6. That thereafter and on or about the 9th day of January, 1973 and the 13th day of February, 1973, the Petitioner and the Respondents submitted to arbitration the controversy between the parties for adjudication and award all matters in dispute between them in accordance with the Constitution and rules of the New York Stock Exchange.

7. That thereafter, the New York Stock Exchange, in accordance with its arbitration rules, designated as arbitrators: Robert M. Flanagan, Robert B. Chamine, Hunter Goodrich, Jr., Salvatore Saladini and John E. Stoddard, and notice of the designation of said arbitrators was duly given to all parties.

8. That thereafter and on the 12th day of February, 1974, the arbitrators after having duly taken the oath prescribed and after the parties had duly appeared before them with counsel a id submitted their proofs and called their respective witnesses and after having completed their studies of all of the facts, circumstances, elements and proofs entering into he controversy so submitted to them as aforesaid and having fully considered all of the evidence and regulations subn itted by the parties to said arbitration proceeding and havir g come to a decision, duly made their award in writing, signed and acknowledged on the 14th day of February, 1974, whereby they determined and awarded that there is due from the Respondents, SAMUEL H. SLOAN and SAM JEL H. SLOAN & CO., to the Petitioner, SHEARSON, HAMMILL & CO., INCORPORATED, the net sum of ELEVEN THOUSAND, FIFTEEN and 56/100 ($11,015.56) DOLLARS and that the administrative fees of the New York Stock Exchange in the amount of ONE HUNDRED TWENTY ($120.) DOLLARS shall be borne by the Respondents. A copy of said award is annexed hereto as EXHIBIT "C".

WHEREFORE, Petitioner demands that a judgment be entered herein confirming the aforesaid award and that judgment be rendered thereon in this Court in the amount of ELEVEN THOUSAND, FIFTEEN and 56/100 ($11,015.56) DOLLARS, plus the sum of ONE HUNDRED TWENTY ($120.) DOLLARS, together with interest, costs and disbursements.

Dated: New York, New York.
March 1, 1974.

LEIBOWITZ, PLATZER & FINEBERG
By: s/ S G Platzer
Sydney G. Platzer
Attorneys for Petitioner
299 Broadway
New York, New York 10007
267-0420

STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

On the 1st day of March, 1974, before me personally appeared SYDNEY G. PLATZER, to me known and known to me to be the individual described in and who executed the foregoing Petition, and he duly acknowledged to me that he executed the same.

s/ Theresa Imbembo
NOTARY PUBLIC

APPENDIX "X"
EXHIBIT "C"

CORRESPONDENCE BETWEEN SYDNEY G. PLATZER AND ROBERT W. TAYLOR

March 13, 1974

Robert W. Taylor, Esq.
160 Broadway
New York, N.Y. 10038

Re: Shearson, Hammill & Co.
Incorporated vs. Samuel H. Sloan et ano

Dear Bob:

Thank you for yours of March 3, 1974.

Please be advised that although an Index Number purchased in 1972 was used with respect to the Petition for Confirmation of the arbitration proceeding, the Petition in and of itself constitutes a separate proceeding solely with respect to the arbitration matter.

Our file and the New York Stock Exchange records indicate that you appeared on behalf of Mr. Sloan with respect to the arbitration proceeding. Therefore, we believe that quite properly you are the person to be served with a Petition to confirm the arbitration award.

Further, I call your attnetion to a conversation that you and I had when we were in the arbitration hearing room. I leaned over and whispered to you "Are you the person to receive the Petition for Confirmation?" To the best of my recollection, your reply was "I guess so. I am appearing for him in the arbitration." In an event, Bob, I do not see what defense can be raised with respect to a Petition to confirm an arbitration proceeding wherein all parties appeared and presented their evidence.

Yours very truly,

SYDNEY G. PLATZER

SGP/ti

March 8, 1974

Leibowitz, Platzer & Fineberg, Esqs.
199 Broadway
New York, N.Y. 10007

Re: Notice of Petition—Index No. 1321/72

Gentlemen:

I have received in my office, March 1, 1974, the above Notice of Petition.

Please be advised that I do not represent Mr. Samuel H. Sloan in any proceeding before the Supreme Court of the State of New York, County of New York, and therefore, must reject the service of the Notice of Petition above.

I would suggest that service be made directly to Mr. Samuel H. Sloan.

Very truly yours,

s/Robert W. Taylor
Robert W. Taylor

RWT:MB

March 14, 1974

Sydney G. Platzer, Esq.
Leibowitz, Platzer & Fineberg, Esqs.
299 Broadway
New York, N.Y. 10007

Re: Shearson, Hammill & Co.
Incorporated vs. Samuel H. Sloan, et ano

Dear Sid:

Receipt is acknowledged of your letter dated March 13, 1974 in regard to the above matter.

I must advise you that I am not authorized to act for Samuel H. Sloan in any legal proceeding that may be undertaken against him even if as a result of the Arbitration Proceeding in which I did represent him.

I do recall a conversation with you at the conclusion of the Arbitration Hearing wherein I did agree that I would accept the Notice of Decision by the Arbitrators, but nothing more.

I would urge that you serve Mr. Sloan personally in any matter beyond what I have outlined above.

Sincerely yours,

s/Robert W. Taylor
Robert W. Taylor

RWT:MB

APPENDIX "Y"
AFFIDAVIT OF JOSEPH S. TAMARGO
DATED MARCH 8, 1974

SHEARSON, HAMMILL & CO., INC.

-against-

SAMUEL H. SLOAN,
SAMUEL H. SLOAN & CO.

State of New York)
County of New York) ss.:

Joseph S. Tamargo, being duly sworn, deposes and says:

1. That I reside at 3301 Lurting Ave., Bronx, N.Y.

2. That I worked for Samuel H. Sloan from the first of June, 1971 to the end of December, 1971 and also during the summer of 1972.

3. That I am rated as a chess master by the United States Chess Federation. I was formerly rated as one of the top fifty chess players in the United States.

4. At the end of July of 1971 Sloan went out of active business. He went to work for J.S. Love & Co. as a securities trader.

5. From the end of July, 1971 through the beginning of November, 1971 I was the sole employee of Sloan.

6. In that capacity I answered the telephone, received and delivered securities and performed various clerical functions for Sloan. As part of my duties I filed letters and correspondence from brokers and maintained the daily blotter and the trading ledger.

7. During this period I made a record of all telephone calls received by Sloan & Co. I also wrote down the name of

the person who called and at the end of the day I called Mr. Sloan to tell him wha had transpired during the day.

8. During the three month period in question when I was alone in the office I recall receiving inquiries from several stock brokerage firms. I do not recall ever receiving an inquiry from Shearson, Hammill & Co. Inc.

9. I am certain that if I had received more than one or two calls from Shearson, Hammill & Co., Inc. I would remember.

10. During the middle of December, 1971 I received a visit from a man who identified himself as Walter Lamb from Shearson, Hammill & Co., Inc. I have a distinct recollection of this visit because Mr. Lamb was irate. He raised his voice and subjected me to verbal abuse. He accused me of being Mr. Sloan and demanded that I return some securities to him.

11. I had no idea what Mr. Lamb was talking about. I reported this conversation to Mr. Sloan. After that I never again heard from Mr. Lamb or from Shearson, Hammill & Co., Inc.

s/ Joseph S. Tarmargo
JOSEPH S. TAMARGO

Sworn to
March 8th, 1974

s/Richard Colwell
Notary Public

APPENDIX "Z"
REPLY AFFIDAVIT OF ROBERT W. TAYLOR
DATED APRIL 27, 1974

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

SHEARSON, HAMMILL & CO., INC.,

Plaintiff,

-against-

SAMUEL H. SLOAN d/b/a SAMUEL H. SLOAN & CO.

Defendants.

STATE OF NEW YORK)
COUNTY OF NEW YORK) SS:

Robert W. Taylor, an attorney-at-law, duly admitted to practice in the State of New York, being duly sworn, deposes and says:

1. That I appeared as the attorney for the respondent at the arbitration hearing in the matter of Shearson, Hammill & Co., Inc., claimant against Samuel H. Sloan & Co. and Samuel H. Sloan, respondents.

2. That I have not appeared in an action before the Supreme Court of the State of New York, bearing the Index Number 1321/1972.

3. That I am not authorized to act for the defendant in that action nor can I accept service of any papers in that action.

4. That I have read the affirmation of Sydney G. Platzer, dated April 17, 1974.

5. That the second sentence of paragraph 5 of that affirmation is false. At no time did the deponent advise Sydney G. Platzer that he had delivered the papers to Mr. Sloan. In fact, he did not deliver the papers to Mr. Sloan.

6. The fact is that the original Notice of Petition was received at my office at a time when I was not present. However, after I returned, I wrote to Sydney G. Platzer, immediately, to advise him that I could not accept service of these papers. I told Mr. Platzer to make service directly on Mr. Sloan. Later the offices of Leibowitz, Platzer & Fineberg served at my office a Proposed Order with a Notice of Entry. I did not accept this service but before I could reject it, the messenger left my office.

7. Again deponent contacted Mr. Platzer, to advise him that I could not accept service of any papers for Mr. Sloan.

8. The arbitration proceeding is entirely separate and distinct from the action before this court. By appearing at the arbitration, deponent did not commit himself to appearing before this court. Similarly, Mr. Hoblin, who represented Shearson, Hammill & Co., Inc., at the arbitration hearing, did not and does not appear in the action before this Court. The appearance of Mr. Platzer at the arbitration hearing which is eluded to in his papers, was solely as that of a witness for the claimant. The purpose of his testimony to which the deponent objected vigorously, was to secure an award of attorneys fees for the claimant.

s/Robert W. Taylor
ROBERT W. TAYLOR

Sworn to
April 27th, 1974

APPENDIX "AA"
OPINION OF GREENFIELD J.
DATED SEPTEMBER 13, 1974

SUPREME COURT—NEW YORK COUNTY
SPECIAL TERM PART I

SHEARSON, HAMMILL & CO. INC.,

Plaintiff,

-against-

SAMUEL H. SLOAN d/b/a
SAMUEL H. SLOAN & CO.,

Defendant.

GREENFIELD, J.

Defendant Sloan moves for vacatur of a judgment entered herein upon plaintiff's unopposed motion to confirm an arbitration award, for dismissal of such application for want of jurisdiction or, in the alternative, consideration thereof upon the merits, and for vacatur of the award.

The first question to be disposed of is movant's contention that the petition for the aforementioned relief was improperly served on the attorney who represented him in the arbitration proceeding. Presumably, the basis for this argument is that on August 29, 1972, defendant filed a statement in accordance with CPLR 321(b) wherein his original attorney of record in this action consented to withdraw as such and to permit defendant to assume his own defense, pro se. After the action was stayed, however, defendant executed and acknowledged another instrument

which he filed together with his submission to arbitration before the New York Stock Exchange (NYSE) wherein he designated Robert W. Taylor, Esq. as his counsel and requested that all "communications" be sent to said attorney. The submission agreement clearly provides, inter alia, that "We, the undersigned parties, ***" do further agree that a judgment of any court having jurisdiction thereof may be entered on said award and to that end do voluntarily submit ourselves to the jurisdiction of said court". Moreover, paragraph VIII of the submission under the heading "Rules and Procedure" provides that "all other notices, orders, papers and communications, including a copy of the award, may be served on any party by delivering or mailing the same to the party or his attorney-in-fact or counsel".

Viewing the foregoing provisions in light of the liberal stance recently adopted by our appellate tribunals in determining questions of jurisdiction and service of papers in judicial proceedings ancillary to arbitration (see, Mtr. of Knickerbocker Ins. Co. [Gilbert], 28 N Y 2d 57; Mtr. of Bauer [MVAIC], 31 A D 2d 239), this court concludes that, in the indicated circumstances, the designation by defendant of Robert W. Taylor, Esq. as his attorney for the receipt of "all communications" should be construed as sufficient authorization for the service upon said attorney of notice of plaintiff's application to confirm its arbitration award. Moreover, as the court in Mtr. of Bauer, supra, observed, the same conclusion may be reached by a liberal construction of CPLR 7506 [subd. (d)].

In any event, it is clear that defendant has no tenable objections on basic jurisdictional grounds. The action here had been merely stayed—not discontinued (see CPLR 7503), so that plaintiff was entitled to serve notice of its application to confirm in the same manner prescribed for service of notice of a motion in an action (Mtr. of A & R Constr. Co. [Gorlin-Okun, Inc.], 41 A D 2d 876). Furthermore, as already noted, the submission agreement

itself contained an e: press consent by defendant to submit his person to the jurisdiction of any court having jurisdiction to enter j idgment upon any award which might properly be rendere by the arbitration panel.

It is evident, hov ever, from defendant's letter dated March 18, 1974, tha defendant did not have possession of plaintiff's moving pa ers on the return day of the motion; that his former att rney, upon whom the papers were served, had no intent on and was not requested to represent defendant and appa ently did not inform his former client when the motion wa made returnable, thereby permitting the entry of a defaul judgment. In the interest of justice, therefore, the Court will regard the default as being excusable and will vac te same and entertain the application to confirm, de novo, upon the merits.

The claim of lac of subject matter jurisdiction, was raised and rejected by this court upon an earlier motion (see order of Mr. Justice Dickens, dated October 4, 1973) and is patently without merit. Nothing in Merrill Lynch, etc. v. Ware (38 L. Ed. 2d 348) or the other cases cited by defendant even remotely supports his contention to the effect that the Federal Securities and Exchange Acts and the rules of the NYSE promulgated thereunder have preempted the right of a state court to confirm a damage award rendered by NYSE arbitrators against a non-member of the exchange pursuant to a non-mandatory submission requested by the latter, based upon the common law tort of conversion, merely because such wrongdoing may also have involved a violation of a federal statute or rule of the exchange or its federal regulatory agency.

Nor is there any competent evidence to support defendant's claims of fraud. Any questions as to the credibility of plaintiff's witnesses was properly a matter for the arbitrators and their determination thereon may not be reviewed by the court.

Defendant's furth r contention that the rules of the arbitral tribunal do n t conform to CPLR Article 75 is also without merit. Ther is no requirement that an award recite or specify th basis for the amount of damages arrived at by the arb itrators (In re Cinebox General Advertising, Inc., 22 N Y 2d 705; United Buying Service Intern Corp. v. United Buy ng Service of Northeastern N.Y. Inc., 38 A D 2d 75, aff'd. 30 N Y 2d 822) and there is no showing that the award here endered fails to comport with any of the formal requisite prescribed by CPLR 7507.

Likewise, the clai n that the arbitrators exceeded their authority or so imp rfectly exercised it that a final and definite award upo the subject matter submitted was never rendered cann ot be sustained.

The claim for co nsel fees was set forth in plaintiff's statement of its clain s annexed to and incorporated in the submission duly ex cuted by both parties (see letter of plaintiff's counsel d ted October 3, 1972 annexed to answering affirmation as part of plaintiff's exhibit B). Accordingly, such clai n was properly before the arbitrators and their determinat ion upon such question, as well as the question of the prop er measure of damages for the conversion, even if error eous as a matter of law, is not subject to judicial review (U nited Buying Service Intern Corp. v. United Buying Service of Northeastern N.Y. Inc., supra; Mtr. of Schine Enterprises, Inc., 26 N Y 2d 799; Lentine v. Fundaro, 29 N Y 2d 382).

The final point referred to in movant's brief; viz., that the parties to this action are different from the parties to the arbitration obv ously overlooks the fact that the co-defendant was dropped as a party upon defendant's own application by the aforementioned order of Mr. Justice Dickens, dated Oct ber 4, 1973.

The remaining arguments advanced by defendant herein fall within the category of either "post mortem" afterthoughts or attempts to argue the merits of his case. In

any event, they de nonstrate no tenable grounds for disturbing the awar(.

Accordingly, defer dant's application for vacatur of the award is denied a1 d plaintiff's motion to confirm is granted.

Dated: September 1 ;, 1974

s/EJG
J.S.C.

APPENDIX BB

ORDER TO SHOW CAUSE

at a Special Term, Part II of The Supreme Court of the State of New York, held in and for the County of New York, at the Courthouse, 60 Centre Street, New York, New York on the 30th day of September, 1974.

PRESENT: Hon. Edward J. Greenfield, Justice.

SHEARSON, HAMMILL & CO., INC.,
Plaintiff.

-against-

SAMUEL H. SLOAN d/b/a SAMUEL H. SLOAN,
Defendant.

SIR:

Upon reading and filing the affidavit of Samuel H. Sloan, sworn to the 30th day of September, 1974 and the summons and complaint and all of the papers and proceedings had herein in support of a motion for reargument of the decision of the Hon. Justice Greenfield dated September 13, 1974 and sufficient reason appearing therefore,

LET the plaintiff and its counsel herein and the Sheriff of the City of New York show cause at a Special Term Part 1 of this Court at 60 Centre Street, on October 3, 1974 at 9:30 o'clock in the forenoon of that day, pr as sppm tjereaft__ica or as soon thereafter as counsel can be heard why an order should not be made dismissing the complaint and vacating the oraer of attachment, and

LET service of a copy of this order on counsel for plaintiff, Leibowitz & Platzer, and upon the Sheriff of the

City of New York by 5:00 P.M. on the 1st day of October, 1974 be deemed sufficient.

ENTER

s/E.J.G., J.S.C.

APPENDIX CC

AFFIDAVIT OF SAMUEL H. SLOAN IN SUPPORT

Index No. 1321/1972

SHEARSON, HAMMILL & CO., INC.

Plaintiff,

-against-

SAMUEL H. SLOAN d/b/a SAMUEL H. SLOAN.

Defendant.

State of New York, County of New York : SS.

SAMUEL H. SLOAN, being duly sworn, deposes and says:

1. He makes this affidavit in support of a motion for reargument of the decision of the Honorable Justice Greenfield dated September 13, 1974 in which a motion for a judgment confirming an arbitration award was granted. A proposed judgment has been submitted to this Court by counsel for plaintiff which has been noticed for settlement for September 30, 1974. The Sheriff of the City of New York has in his possession property of the defendant amounting to $12,500. This sum of money is being held pursuant to an order of attachment which was obtained by plaintiff on February 2, 1972 based upon the allegation that the property of the plaintiff had been converted. Defendant wishes to appeal from any judgment entered in this action. For this reason, he asks that this Court grant a stay pending determination of this motion and if the motion is denied, a further stay pending appeal.

2. The basis for this motion for reargument lies in the fact that this action was commenced by obtaining an order of attachment dated February 2, 1972. That order of at-

tachment was served upon the Chemical Bank which promptly turned over the sum of $12,500.00 to the Sheriff of the City of New York. These funds have been held by the Sheriff from February, 1972 to the present. A copy of the order of attachment is attached hereto and marked exhibit A.

3. This order of attachment was obtained on the basis of a supporting affidavit of Armand Zerilli. A copy of that affidavit is attached hereto and marked exhibit B. The attachment was based upon the allegation that the defendant had "converted" 500 shares of DOCUTEL CORP. belonging to plaintiff.

4. Various motions were made by the defendant to vacate this order of attachment on various grounds. One of the grounds for moving to vacate was that the attachment provisions of the State of New York are unconstitutional under *Fuentes v. Shevin*, 407 U.S. 67, 32 L.Ed. 2d 556. Defendant wishes to raise the issues again in making this motion to reargue especially since the judge who decided the original motion made no reference to this issue in his decision. (As a precautionary measure, defendant will serve these motion papers on the U.S. Attorney. Defendant understands that this may be the proper procedure on any motion where a constitutional question is raised.)

5. On February 12, 1974, an arbitration hearing was held by the New York Stock Exchange which resulted in an arbitration award in favor of the plaintiff in the amount of $11,015.56 or $1,484.44 less than the amount attached.

6. Defendant maintains that the arbitration proceeding is separate and distinct from the proceeding before this court in spite of the fact that this action is stayed pending arbitration. Defendant further maintains that this action should be dismissed on the grounds of arbitration and award and other grounds and that the plaintiff should be required to start a new action in the form of a special proceeding to confirm an arbitration award. Thus far this Court has rejected this argument. Defendant submits that

this Court is in error. The proof of this lies in the mechanical difficulties now facing the Court with respect to the $12,500.00 now held by the Sheriff pursuant to the order of attachment. In the interest of justice, the Court should decide that $11,015.56 of that money should be paid over to the plaintiff and the balance should be returned to the defendant. This will be a messy procedure especially since the Sheriff of the City of New York wants his poundage and since the defendant intends to appeal from any order of judgement entered in this action by the Court. However, the proposed judgement submitted to this Court asks for an additional $385.54 in interest plus $125.00 in costs for a total of $11,516.10. Furthermore, the Sheriff wants $625.00 in poundage which represents 5% of the amount attached. That would result in a total assessment against the defendant of $12,141.10 which would leave him with only $358.90 instead of $1,484.44. This is unjust and unfair for a number of reasons. To begin with, the plaintiff should be required to pay to defendant interest on $1,484.44 held by the Sheriff for more than two and a half years. It must be remembered that the arbitrators already awarded interest in favor of plaintiff based upon the period from February 1972 to February 1974. (Actually, it is impossible to determine precisely what the arbitrators awarded, which is one of the grounds on which defendant moved to overturn the arbitration award.) Also, the bank account at Chemical Bank from which the $12,500 was obtained was an account in the name of Samuel H. Sloan & Co. Originally, the defendant to this lawsuit was "Samuel H. Sloan and Harry G. Theodos as co-partners doing business under the name of Samuel H. Sloan & Co." However, later Harry G. Theodos was dropped as a party defendant as noted by the decision of the Court of September 13, 1974. For this reason, it is unjust to use that $12,500.00 to satisfy this arbitration award. In addition, it is inequitable for the defendant to pay poundage since the Sheriff has done nothing of benefit to any of the parties and should not be entitled to a fee. All

the Sheriff did was to serve a copy of the order of attachment upon the Chemical Bank. No special proceeding was required to obtain the attached funds. Thus the Sheriff performed a purely ministerial function.

7. As stated previously, the fee which the Sheriff will demand will come to $625.00. However, if this action were dismissed and if the order of attachment were vacated, the plaintiff would be required to start a new special proceeding and the defendant would save the entire Sheriff's fee plus the other costs.

8. This would be the only equitable result especially since the order of attachment was improper in the first instance. Plaintiff never proved its original claim that defendant had converted securities belonging to the defendant. In fact, it proved exactly the opposite. It seems that plaintiff's position as to the facts is that in June, 1971 the plaintiff inadvertently delivered certain securities to the defendant, who then sold them to First of Texas, Inc., who then resold those identical securities back to the plaintiff. Thus, when the plaintiff went to court and obtained the order of attachment, the 500 shares of Docutel Corp. alleged to have been converted was actually in the possession of plaintiff. One significant point is that during the time the original transactions in question took place, in June and July of 1971, the security in question, DOCUTEL CORP., was selling in the range of $8.00 to $9.00 per share. However, by the time the plaintiff got around to commencing this action, in February 1972, Docutel Corp. was selling for $25.00 per share. Thus this action was commenced to recover the sum of $12,500.00 which represented the value of 500 shares of DOCUTEL CORP. at its value of $25.00 per share in February, 1972, whereas the value of these shares at the time they were allegedly converted was in the vicinity of $4,500.00. Plaintiff repurchased these shares in July and August 1971, when they were still selling for around $9.00 per share. Thus, the real damages suffered by the plaintiff by any calculation was around $4,500.00.

Only by bringing an action for replevin could plaintiff claim the sum of $12,500.00.

By bringing an action to recover $12,500.00 the plaintiff is seeking to earn an $8,000.00 profit for itself and to cause the defendant to incur a similar loss.

9. Plaintiff recognized the natural unwillingness of this court to relitigate a matter which has already been decided at an arbitration proceeding. However, the question before this Court is one of fraud upon this Court, to wit, the question of whether the plaintiff defrauded the Court in obtaining the original order of attachment under false pretenses. That matter was never ruled upon or even considered by the arbitrators. The defendant has every right to litigate this issue in this Court. In fact, the arbitrators seemed to be under the impression, based upon representations to that effect by opposing counsel, that the Supreme Court of the State of New York had already decided that the securities in question had been converted and that the only issue before them was the measure of damages. Defendant attributes the unfavorable award, which, he submits is directly contrary to the law in this state, to this mistaken impression. The Court is aware that merely by granting an order of attachment and by denying a motion to vacate, Court does not decide anything on the merits.

10. As things presently stand, there is no procedure to litigate the question of fraud upon this Court in this action. If the arbitration award is confirmed here, the matter will be closed without this issue ever having been litigated. Defendant could start a new action against Shearson, Hammill & Co., Inc., based upon a theory of tort, but that would raise the spectre of interminable litigation with respect to the issues involved in this lawsuit. Defendant

would like to point out that according to a recent edition of the *New York Law Journal*, there is a case that has been pending in the United States District Court for the Southern District of New York for 32 years. At the rate the instant action has been going, such a possibility with respect to this litigation does not seem entirely unlikely.

11. Defendant wishes to incorporate into this affidavit by reference all of the arguments previously made in his motion to open the default judgement. In particular, he wishes to call attention of the Court to his claim that this Court has no jurisdiction to confirm the award for several reasons. While he realizes that the Court has ruled against him and he had preserved this argument for appeal, he wishes to point out that it would be much "cleaner" for this Court to dismiss this action, which would not prejudice the rights of the parties in any way, and to thereby permit all of the issues to be raised and litigated in an appropriate forum. If the Court were to do this, the plaintiff would have no right to complain. The plaintiff chose to commence this action by obtaining an order of attachment. The plaintiff also voluntarily chose to join the New York Stock Exchange, to be subjected to the compulsory arbitration provisions of its rules, and to be regulated under the Securities & Exchange Act of 1934 and the rules promulgated thereunder. In theory at least, if the plaintiff never violated any of the rules promulgated under that act, it would never have occasion to bring a lawsuit against a customer. However, Shearson, Hammill & Co., Inc., has done this much more often than most stockbrokers. The U.S. District Courts have exclusive jurisdiction over actions involving the Securities Exchange Act of 1934 under section 27 of that act. &15 U.S.C. 78 aa)

12. It is important not to lose sight of the basic factual issues in dispute. Defendant contends that the plaintiff has defrauded this Court in a number of ways, the first being by obtaining an order of attachment based on the fraudulent allegation that the securities had been con-

verted. Thus far, the plaintiff has never revealed whether the shares allegedly delivered by mistake to defendant belonged to Shearson, Hammill & Co., Inc., or whether they were being held for the account of a customer. Plaintiff also never revealed whether, when these identical shares were repurchased by plaintiff, they were purchased in a propriety account or for the account of a customer and whether plaintiff made a profit on the transactions in question. (It is important not to confuse the issues in dispute. Plaintiff claims to have repurchased the 500 Docutel shares twice. The first time came in July and August of 1971 when plaintiff repurchased the identical shares bearing the same certificate numbers. The second time came in January 1972, when plaintiff purchased 500 Docutel Corp. shares in the open market for the purpose of fixing the damages as alleged in this lawsuit.)

13. Although admittedly these questions relate to matters which were before the arbitrators, they also bear upon the question of fraud upon this Court. Furthermore, they affect the question of how the Sheriff should dispose of the $12,500.00 in his possession. The defendant has been deprived of his property rights for a two and a half year period. Even taken in the most favorable light, the arbitrators still decided that the plaintiff was not entitled to $12,500.00. Actually, the defendant offered to settle for $4,500.00 at the outset of this litigation and the arbitrators considered an award of $3,075.00 in attorneys fees (which defendant claims was erroneous) so that the sum of money finally awarded was closer to the amount offered by the defendant than the amount demanded by the plaintiff.

14. The fact is that the plaintiff should have proceeded to arbitration in the first instance. From the beginning, the action before this Court was superfluous and unnecessary. The only apparent reason for the bringing of this action was to tie up defendant's money while the arbitration proceeding was pending. It is wrongful to use the Courts in this manner and the plaintiff should not be rewarded for

wrongful conduct. At the same time, the defendant should not be punished for defending in a lawsuit which he had every right to defend and where his position was ultimately, at least partially vindicated. However, if the Court confirms the award of the arbitrators, it will be punishing the defendant and rewarding the plaintiff. There is no reason for such an unequitable reult when another remedy is available to the plaintiff, namely, a special proceeding to confirm the arbitration award.

15. For all of these reasons, the motion for reargument should be granted, the action should be dismissed, and the order of attachment dated February 2, 1974 should be vacated. However, it is also possible that there is some other remedy available. The court could order a trial or a hearing on the issue of fraud upon the Court. The defendant can cite no instance where the Court has fashioned such relief under these circumstances but, on the other hand, defendant is unable to find a reported case quite like this one. Therefore an unusual form of relief would perhaps be appropriate. The Court, in its discretion, has the power to order such relif.

WHEREFORE, defendant respectfully prays that the motion for reargument be granted, that the action be dismissed, and that the order of attachment dated February 2, 1974 should be vacated and for such other further relief as may be deemed just and equitable.

[S/Samuel H. Sloan]

[Sworn to September 30, 1974]

APPENDIX DD
ORDER DATED OCTOBER 3, 1974 DENYING MOTION FOR REARGUMENT

Supreme Court of the State of New York, Special Term, Part 1, New York County, at the Courthouse thereof, 60 Centre Street, New York City 7, New York.

Present: Hon. Edward J. Greenfield, *Justice.*

Shearson, Hammill & Co., Inc.

-against-

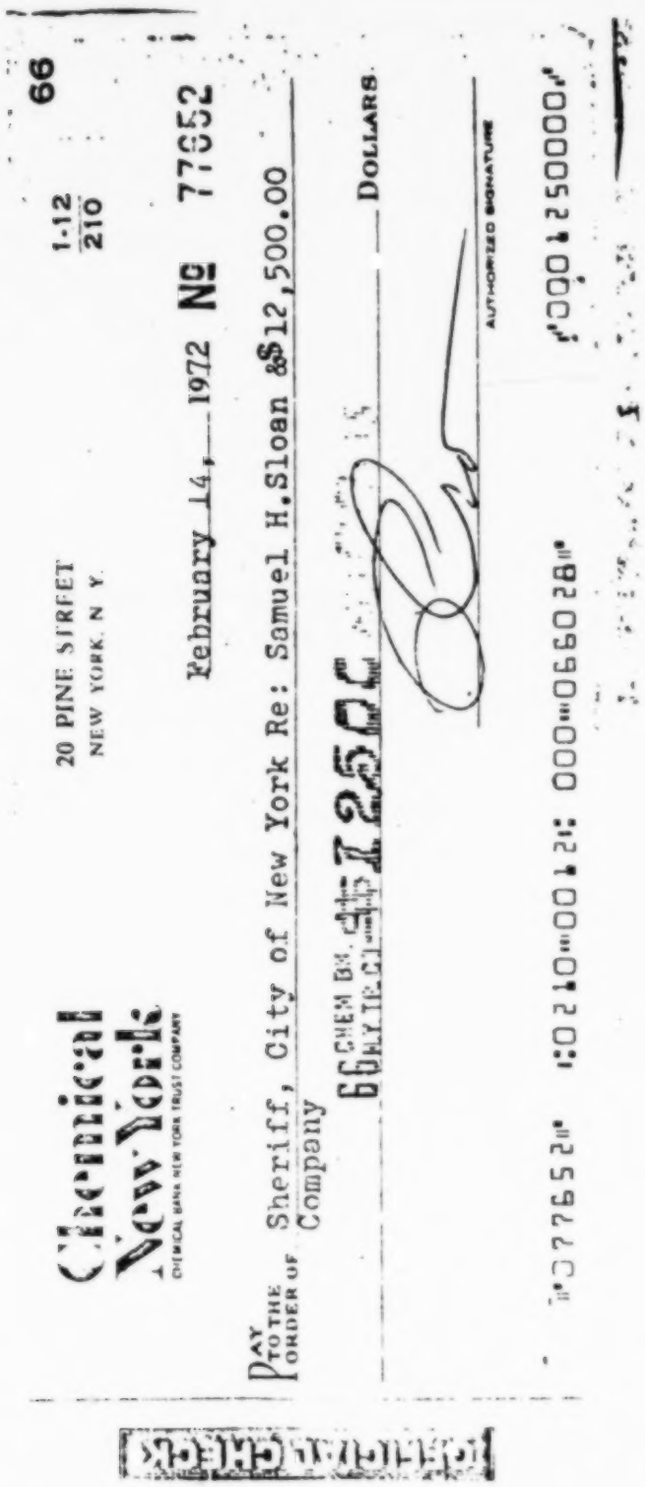
Samuel H. Sloan, etc.

Defendant's motion for reargument denied.

Dated: October 18, 1974.

APPENDIX EE

Exhibit C filed in support of motion for stay in the Appellate Division. Official check from Chemical Bank in the amount of $12,500.00 payable to Sheriff of The City of New York.



APPENDIX FF

Decision of New York State Supreme Court, Appellate Division, First Department, dated July 3, 1975 affirming judgment.

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on July 3, 1975.

Present: Hon. Harold A. Stevens, Presiding Justice
Theodore R. Kupferman, Vincent A. Lupiano, George Tilzer, Emilio Nunez, Justices.

799-800

Shearson, Hammill & Co., Inc.
Plaintiff-Respondent,

-against-

Samuel H. Sloan d/b/a Samuel H. Sloan & Co.,
Defendant-Appellant

An appeal having been taken to this Court by the defendant-appellant from a judgment of the Supreme Court, New York County (Quinn, J.), entered on October 2, 1974, granting plaintiff-respondent's petition to confirm an arbitration award in favor of plaintiff-respondent and against the defendant-appellant in the aggregate sum of $11,442.28,

And said appeal having been argued by Mr. Samuel H. Sloan, appellant pro se, and by Mr. Sydney G. Platzer of counsel for the respondent; and due deliberation having been had thereon,

It is unanimously ordered that the judgment so appealed from be and the same is hereby affirmed, and that the respondent recover of the appellant $60 costs and disbursements of this appeal.

Defendant-appellant's appeal from an order of said Court (Greenfield, J.), entered on October 24, 1974, is hereby dismissed as nonappealable, without costs and without disbursements.

ENTER:
JOHN M. LAWLESS
DEPUTY CLERK.

APPENDIX GG

Motion by Samuel H. Sloan dated July 30, 1975 for reargument and for disqualification of Lupiano, J.

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION — FIRST DEPARTMENT

Shearson, Hammil & Co., Inc.,
Plaintiff-Respondent,

-against-

Samuel H. Sloan d/b/a Samuel H. Sloan & Co.,
Defendant-Appellant

Index No. 1321/1972

PLEASE TAKE NOTICE that upon the annexed affidavit of Samuel H. Sloan sworn to the 30th day of July, 1975 and all of the papers and proceedings had herein the undersigned will move this court on the 8th day of August, 1975 for an order vacating the prior order of this court entered on July 3, 1975 and granting reargument and disqualifying and/or recusing the Hon. Vincent A. Luciano from proceeding further on this case and for such other and further relief as may be just and equitable on the grounds that Mr. Justice Lupiano, who sat on the panel of judges which heard this appeal, was not qualified to do so because of his previous connection with this case in that he decided the original motion to vacate the order of attachment in the court below.

Dated: Lynchburg, Virginia, July 30, 1975

Yours, etc.

s/Samuel H. Sloan

To: Leibowitz, Platzer & Fineberg, Counsel for Plaintiff, 299 Broadway, New York, N.Y.

Affidavit of Samuel H. Sloan in Support of Motion

Commonwealth of Virginia — City of Lynchburg: ss.:

Samuel H. Sloan, being duly sworn, deposes and says:

1. I make this affidavit in support of a motion for an order vacating the prior order of this court entered on July 3, 1975 and granting reargument and disqualifying and/or recusing the Hon. Vincent A. Lupiano from proceeding further on this case and for such other and further relief as may be just and equitable on the grounds that Mr. Justice Lupiano, who sat on the panel of judges which heard this appeal, was not qualified to do so because of his previous connection with this case in that he decided the original motion to vacate the order of attachment in the court below.

2. This action was commenced by the obtaining of an order of attachment on February 2, 1972. I immediately moved, through counsel, to vacate the order of attachment. That motion was decided on February 17, 1972 by the Hon. Vincent A. Lupiano. The decision was adverse to me. His decision appears on page 22 of the appendix to this appeal.

3. My appeal brief contained considerable criticism of the decision of the Hon. Vincent A. Lupiano. Naturally, when I wrote my appeal brief I did not realize that Mr. Justice Lupiano would be one of the judges who would be sitting on the panel which would decide my appeal.

4. At oral argument on this appeal, Mr. Justice Lupiano displayed his lack of tolerance for the ideas I was expressing by leaving the courtroom almost as soon as I commenced to argue my side of the case. He did not return

until after my adversary had started to speak. The entire oral argument lasted only about 20 minutes and during approximately half of that time Mr. Justice Lupiano was not sitting on the bench. It is submitted that this conduct displays bias and prejudice and that he was unqualified to sit on this case for that reason as well as for the reason that he had previously heard this case twice in the court below. (Mr. Justice Lupiano also refused to accept a referral from Mr. Justice Gellinoff in a subsequent decision.)

5. It is well established by many United States Supreme Court decisions that a judge who sat on the court of original jurisdiction cannot sit on the same case in a court of appeals. *United States v. Lancaster*, 5 Wheat 434, 5 L. Ed. 127; *Delaney v. United States*, 263 U.S. 586, 44 Ct. 206, 68 L. Ed. 462; *Rexford v. Brunswick-Balke-Collender Co.*, 228 U.S. 339, 33 S. Ct. 515, 57 L. Ed. 864; *William Cramp & Sons Ship & E. Bldg. Co. v. International C.M.T. Co.*, 228 U.S. 645, 33 S. Ct. 722, 57 L.Ed. 1003; *Moran v. Dillingham*, 174 U.S. 153, 19 S. Ct. 620, 43 L. Ed. 930. Furthermore, this requirement is not waivable even if both parties consent. *William Cramp & Sons Ship & E. Bldg. Co., supra.*

6. In *Laird v. Tatum*, 409 U.S. 824, 93 S. Ct. 7, 34 L.Ed. 2d 50, on a motion directed to Mr. Justice Rehnquist to recuse himself after the case had been decided, Mr. Justice Rehnquist discussed this rule and seemed to express the view that an exception might be made in the case of the United States Supreme Court justice because (1) the fact tHat A judge in the Supreme Court unlike other courts a judge cannot be substituted, (2) the possibility of affirmance by an equally divideRourt and (3) the need for uniformity of decisions in the United States Supreme Court. None of those arguments apply here because in the Appellate Division — First Department there are many other judges who could have sat in place of Mr. Justice Lupiano.

7. It is a denial of the Fourteenth Amendment rights to

due process of law and to the equal protection of the law for a judge to sit on an appeal in a case that he sat on in the court below. In addition, this same conduct is a contravention of the standards of judicial conduct of the American Bar Association. For this reason the order of the appellate division should be vacated and the cause set down for reargument.

8. I should like to point out that the Appellate Division in this case affirmed the judgment in the court below without opinion. That judgment awarded to plaintiff the sum of $11,442.28. I submit that this decision was contrary to about fifty cases cited in my appeal brief. I believe that this fact serves to emphasize the point that the same judge should not be permitted to sit on the same case on appeal.

WHEREFORE, I respectfully pray that this court grant an order vacating the prior order of this court entered on July 3, 1975 and granting reargument and disqualifying and/or recusing the Hon. Vincent A. Lupiano from proceeding further on this case and for such other and further relief as may be just and equitable.

s/Samuel H. Sloan

Sworn to July 30, 1975.

APPENDIX HH

Affirmation of Sydney G. Platzer in opposition dated September 11, 1975

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION — FIRST DEPARTMENT

Shearson, Hammil & Co., Inc.,
Plaintiff-Respondent,

-against-

Samuel H. Sloan d/b/a Samuel H. Sloan & Co.,
Defendant-Appellant.

Index No. 1321/1972

State of New York — County of New York: s:

Sydney G. Platzer, an attorney at law duly admitted to practice in the State of New York hereby affirms:

1. That this affirmation is submitted in opposition to appellants motion herein.

2. The motion should be denied in view of the fact that the appeal was decided against appellant unanimously and that the Hon. Vincent A. Lupiano heard only an interim motion in the Supreme Court and did not render the final judgement on this matter.

s/Sydney G. Platzer

New York, New York, August 15, 1975

APPENDIX II

Order dated September 11, 1975 denying motion.

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on September 11, 1975.

Presiding—Hon. Harold A. Stevens, Presiding Justice,
Arthur Markewich, Theodore R. Kupferman, Myles J. Lane, Emilio Nunez Justices.

M-2152

Shearson, Hammil & Co., Inc.,
Plaintiff-Respondent,

-against-

Samuel H. Sloan d/b/a Samuel H. Sloan & Co.,
Defendant-Appellant.

The above named defendant-appellant having moved for leave to reargue his appeal from the judgment of the Supreme Court, New York County, entered on October 2, 1974, which judgment was unanimously affirmed by order of this Court entered on July 3, 1975; and from the order of said court entered on October 24, 1974, which order was unanimously dismissed by order of this Court entered on July 3, 1975; and for other relief,

Now, upon reading and filing the notice of motion, with proof of due service thereof, and the affidavit of Samuel H. Sloan in support of said motion, and the statement of Sydney G. Platzer in opposition thereto, and after hearing Mr. Samuel H. Sloan for the motion, and Mr. Sydney G. Platzer opposed,

It is ordered that said motion be and the same is hereby denied in all respects with $20 costs.

ENTER:
HYMAN W. GAMSO
Clerk.

APPENDIX JJ

Jurisdictional Statement to State of New York Court of Appeals

STATE OF NEW YORK
COURT OF APPEALS

Shearson, Hammill & Co., Inc.
Plaintiff-Respondent

-against-

Samuel H. Sloan d/b/a Samuel H. Sloan & Co.
Defendant-Appellant

JURISDICTIONAL STATEMENT

This appeal is taken from the decisions and orders of the Appellate Division of the New York Supreme Court, First Department dated July 3, 1975 and September 11, 1975. Notices of appeal were served on July 29, 1975 and September 18, 1975 respectively. The attorney for the respondent is Leibowitz, Platzer & Fineberg, 299 Broadway, New York, New York 10007. Attached hereto as Exhibits A and B are the notices of appeal. Attached hereto as Exhibits C and D are the decisions and orders of the Appellate Division, First Department. Attached hereto as Exhibit E is the judgment entered on October 2, 1974. Attached hereto as Exhibit F is the order of attachment dated February 2, 1972 upon which this action was commenced. Attached hereto as Exhibit G is the opinion of Mr. Justice Greenfield dated September 13, 1974. Attached hereto as Exhibit H is the decision of Mr. Justice Lupiano dated February 17, 1972. Attached hereto as Exhibits I and J is a decision and order of Mr. Justice Starke dated April 6, 1972 and April 19, 1972 respectively.

This appeal is taken as a matter of right in accordance with CPLR 5601(b) which says:

An appeal can be taken to the Court of Appeals as a matter of right:

> 1. from an order of the appellate division which finally determines an action where there is directly involved the construction of the constitution of the state or of the United States; and
>
> 2. from a judgment of a court of record of original instance which finally determines an action where the only question involved on appeal is the validity of a statutory provision of the state or of the United States under the constitution of the state or of the United States.

This is an appeal from the orders of the Appellate Division, First Department entered on July 3, 1975 and September 11, 1975. The first of these summary dispositions is reported as *Shearson, Hammill & Co., Inc. v. Sloan*, 49 A.D.2d 521, 373 N.Y.S. 2d 849 (1975). Directly involved in this appeal is the question of the validity of CPLR article 62, the attachment statute. The plaintiff-respondent commenced this action by obtaining an ex parte order of attachment for the sum of $12,500. Jurisdiction was claimed to have been acquired by the levy by the Sheriff of New York County on the account of Samuel H. Sloan & Co. at Chemical Bank. Appellant was not accorded prior notice of this order of attachment and has never been given the opportunity for a hearing with respect to the question of the validity of the order of attachment. The defendant-appellant made several motions to vacate the order of attachment and asserted various grounds including the grounds that the order of attachment resulted in an unconstitutional taking of property and deprived the defendant-appellant of due process of law as guaranteed to him by the Fifth and Fourteenth Amendments to the Constitution of the United States. These motions were denied and ultimately the plaintiff-

respondent obtained a default judgment. An appeal was taken to the Appellate Division, First Department. Both sides briefed the question of the constitutionality of the attachment statute. However, the Appellate Division, in affirming the default judgment, rendered no opinion.

Since an appeal may be had as a matter of right to the State of New York Court of Appeals, it was not necessary to seek leave to appeal in the Appellate Division and, accordingly, no leave to appeal was sought. It should be noted, however, that the constitutional question involved in this appeal is substantial and, indeed, a three judge United States district court has declared CPLR article 62 to be unconstitutional. See *Sugar v. Curtis Circulation Co.*, 383 F. Supp. 643 (S.D.N.Y 1974). In that case, the Attorney General for the State of New York filed a notice of appeal to the Supreme Court of the United States. The Supreme Court noted probable jurisdiction and, after briefing and oral argument, remanded the case to the district court and directed it to abstain from a decision of the federal constitutional issues until the parties had an opportunity to obtain a construction of New York law from New York state courts. *Hugh Carey v. Sugar*, ——U.S.——, (Decided March 24, 1975). Accordingly the constitutional question presented here remains unresolved.

Although this appeal has been taken as a matter of right because the question of the constitutional validity of a New York statute is involved, this court must consider as well the non-constitutional questions involved in this appeal prior to deciding the constitutional issues in order to avoid any unnecessary adjudication of a constitutional question. Thus, all issues which were raised in the briefs filed in the Appellate Division are properly reasserted here. This is particularly true here because the only questions involved in this appeal are questions of law in that there has been no hearing an no judicial fact finding of any kind.

The question of the constitutionality of the New York State attachment statute is clearly substantial. The New

York State attachment as applied in this case does not differ significantly from the replevin laws of Florida and Pennsylvania held to be unconstitutional in *Fuentes v. Shevin*, 407 U.S. 67 (1972) or from the Georgia garnishment statute held to be unconstitutional in *North Georgia Fishing v. Di-Chem*, 419 U.S. 601 (1975). Significantly, the defendant-appellant was never accorded the opportunity for a hearing of any kind and thus the Supreme Court's decision in *Mitchell v. W. T. Grant*, 416 U.S. 600 (1974) does not control. Resolution of this constitutional question in favor of the defendant-appellant will necessarily result in a reversal of the judgment below because the jurisdiction of the New York state courts rests upon the order of attachment.

This appeal also raises a mixture of other procedural, jurisdictional and constitutional questions which are necessarily involved in the resolution of this appeal. The defendant-appellant contends that the New York State Supreme Court does not have the jurisdiction to confirm an arbitration award of the New York Stock Exchange since Section 27 of the Securities Exchange Act of 1934 confers "exclusive jurisdiction" on the federal district courts. cf. *New York Stock Exchange v. Goodbody*, 42 A.D.2d 556, 345 N.Y.S.2d 58 :1973). The defendant-appellant further contends that in the course of the proceedings below a variety of state procedural rules have been violated and that, in the course of these violations, the defendant-appellant has been deprived of various constitutional rights. A complete list of the questions presented in this appeal is as follows:

Questions Presented

1. Is the New York State attachment statute, CPLR Article 62, unconstitutional facially and as applied in this case? Answer below. No.

2. Was the defendant-appellant deprived of the notice and the opportunity for a hearing which is mandated by

the Fifth and Fourteenth Amendments to the Constitution of the United States in that the petition to confirm the arbitration award was never served upon him as is required by CPLR 403 (c) and, as a result, a default judgment was entered? Answer below. No.

3. Was the defendant-appellant deprived of his Fifth and Fourteenth Amendment constitutional rights in that the defendant-appellant was never accorded any hearing with regard to the validity of the order of attachment and/or with regard to his claim that the arbitration award was invalid because of corruption and fraud upon the arbitrators? Answer below. No.

4. Does the New York State Supreme Court have subject matter jurisdiction over a controversy such as this between two broker dealers registered with the Securities & Exchange Commission where the controversy involves a securities contract and delivery, where both sides have impliedly accused each other of violations of the Securities Exchange Act of 1934, where the defendant is entitled to arbitration as a matter of right before the New York Stock Exchange in accordance with Section 6 of the Securities Exchange Act of 1934 (15 U.S. c.s. 78 f) and the rules of the New York Stock Exchange promulgated thereunder, where the Federal Arbitration Act, 9 U.S.C. 9, provides a specific procedure to confirm such arbitration awards in the federal courts, where Section 27 of the Securities Exchange Act, 15 U.S.C. 78aa, states that the jurisdiction of the United States district courts in matters such as this shall be exclusive, and where the United States Supreme Court declared in *Merrill, Lynch, Pierce, Fenner & Smith v. Ware*, 414 U.S. 117, 130 (1973) that any action such as this one which touches upon questions of fair dealing D the protection of investors must be litigated in the federal forum? Answer below. Yes.

4a. Is the defendant-appellant entitled to a dismissal of this action in accordance with CPLR 3211 (a) (5) and

McNulty v. Solley (1884) 95 N.Y. 242? Answer below. No.

5. Should the New York State Supreme Court vacate or modify the decision of the arbitrators of the New York Stock Exchange or conduct a hearing with regard to this question? Answer below. No.

6. Is the order and judgment of the New York State Supreme Court entered on October 2, 1974 defective and invalid on its face and must therefore that order and judgment be vacated? Answer below. No.

7. Did the New York State Supreme Court, by Mr. Justice Edward T. McCaffrey, err and deprive the defendant of his constitutional rights in granting plaintiffs ex parte motion for an order of attachment? Answer below. No.

8. Did New York State Supreme Court Justices Lupiano, Starke, Postal, Martin Evans and Greenfield err and deprive the defendant-appellant of his constitutional rights by failing to vacate the orders of attachment and by failing to conduct a hearing concerning the same? Answer below. No.

9. Did the New York State Supreme Court, by Mr. Justice Greenfield, err in failing to vacate the default judgment? Answer below. No.

10. Did the existence of the order of attachment which was outstanding throughout the New York Stock Exchange arbitration proceedings unfairly and unduly prejudice the due process rights of the defendant-appellant? Answer below. No.

11. Did Mr. Justice Lupiano, the New York State Supreme Court Justice who denied the original motion to vacate the order of attachment and who subsequently sat as a member of the five judge panel of the Appellate Division First Department which decided the appeal to that court, violate the due process rights guaranteed to the defendant-appellant by the Fifth and Fourteenth

Amendments to the Constitution of the United States by failing to recuse himself from hearing that appeal? Answer below. No.

12. Did Mr. Justice Lupiano violate the due process rights of the defendant-appellant and act in a manner unfair and prejudicial to the defendant-appellant by leaving the courtroom almost as soon as the pro se defendant-appellant had commenced his oral argument and by failing to return until after the defendant-appellant had completed his presentation and counsel for the plaintiff-respondent had commenced to speak? Answer below. No.

13. Should the order of the New York State Supreme Court, Appellate Division, First Department be vacated and should this appeal be remanded to that court for a statement of reasons in view of the circumstances of this protracted litigation, the complexity of the issues involved in this appeal, the fact that the plaintiff-respondent served and filed his appeal brief out of time following repeated delays and procrastinations on the part of counsel for plaintiff-respondent, and in view of the fact that this appeal brings up for review twenty decisions and orders by various Supreme Court Justices followed by the entry of a default judgment which was followed in turn by six orders of the Appellate Division, First Department, all of the latter of which were entered without opinion?

Dated: April 15, 1976

Respectfully submitted,

s/Samuel H. Sloan

*****

Exhibit A

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION : FIRST DEPARTMENT

Index No. 1321/1972
NOTICE OF APPEAL

SHEARSON, HAMMILL & CO., INC.,

Plaintiff,

-against-

SAMUEL H. SLOAN d/b/a SAMUEL H. SLOAN & CO.,

Defendants.

PLEASE TAKE NOTICE, that the above named defendants hereby appeal to the State of New York Court of Appeals from the order of the Appellate Division, First Department of the Supreme Court of the State of New York in this action entered in the office of the Clerk of said Court on the 3rd day of July, 1975 and from each and every part thereof.

DATED: July 29, 1975

Yours, etc.

s/Samuel H. Sloan

*****

Exhibit B
Notice of Appeal dated September 18, 1975

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

1321/1972

shearson, Hammil & Co., Inc.,

Plaintiff-Respondent,

-against-

Samuel H. Sloan, do ng business as Samuel H. Sloan & Company

Defendant-Appellant.

PLEASE TAKE NOTICE that the undersigned hereby appeals to the State of New York Court of Appeals from all parts of the decision and order of the Supreme Court, Appellate Division — First Department entered on September 11, 1975 in which the motion to recuse the Hon. Vincent A. Lupiano from participating in this appeal and the motion for reargument were denied.

Dated: Lynchburg, Virginia, September 18, 1975

Yours etc.

SAMUEL H. SLOAN
Defendant-Appellant, Pro se

*****

APPENDIX KK

Notice of Motion dated August 19, 1976 to Dismiss Appeal

New York County Clerk's Index No. 1321/1972

COURT OF APPEALS
STATE OF NEW YORK

Shearson, Hammill & Co., Inc.,

Plaintiff-Respondent,

-against-

Samuel H. Sloan d/b/a Samuel H. Sloan & Co.,

Defendant-Appellant.

SIR:

PLEASE TAKE NOTICE, that upon the annexed affidavit of SYDNEY G. PLATZER, sworn to the 19th day of August, 1976, Plaintiff-Respondent herein will move this Court on the 13th day of September, 1976 at the opening of the Court on that day or as soon thereafter as counsel can be heard for an Order dismissing the Appeal herein taken by the Defendant-Appellant from the Orders of the Appellate Division, First Department entered on July 3, 1975 and September 11, 1975 on the grounds that this Appeal is not permitted as a matter of right, and for such other and further relief as to the Court may seem just together with the costs of this motion.

Dated: New York, New York. August 19, 1976.

Yours, etc.,

LEIBOWITZ, PLATZER & FINEBERG

*****

APPENDIX LL

Affidavit of Sydney G. Platzer dated August 19, 1976 in Support of Motion to Dismiss Appeal

COURT OF APPEALS
STATE OF NEW YORK

New York County Clerk's Index No. 1321/1972

Shearson, Hammill & Co., Inc.,
Plaintiff-Respondent,

-against-

Samuel H. Sloan d/b/a Samuel H. Sloan & Co.,
Defendant-Appellant.

State of New York — County of New York: SS.:

SYDNEY G. PLATZER, being duly sworn, deposes and says, that:

1. He is a member of the firm of LEIBOWITZ, PLATZER & FINEBERG, attorneys for SHEARSON, HAMMILL & CO., INC., Plaintiff-Respondent herein, and is fully familiar with the facts and circumstances in this matter.

2. The within action was commenced by the obtaining of an Order of Attachment and thereafter the service of a Summons and Complaint herein.

3. Subsequent to the obtaining of the Order of Attachment, the matter at the insistance of the Defendant-Appellant herein, proceeded to arbitration and a decision and award was granted to Plaintiff-Respondent herein in the arbitration proceeding.

4. Thereafter, Judgment was entered upon the award in the arbitration proceeding.

5. Defendant-Appellant appealed to the Appellate Division of the First Department and raised among the questions at that time the validity of the Order of Attachment. The Order of Attachment had been sustained in multiple motion attacks in the Court below and the Appellate Division affirmed the judgment of the Court below.

6. It is respectfully submitted that in view of the fact that Defendant-Appellant herein had a hearing in the arbitration proceeding and that the arbitration award was affirmed, the question of the validity of the attachment is a moot point in that the proceeds of the attachment were used to satisfy a duly entered Judgment in favor of the Plaintiff-Respondent.

7. The Appellate Division in its opinion did not determine the validity or the invalidity of the New York State attachment statutes. By virtue of lack of decision with respect to same in that the question was never reached nor was a determination of same required, it is submitted that this Appeal does not lie as to that question.

8. It is, therefore, respectfully submitted that this Appeal cannot be taken as a matter of right since there was no construction of the Constitution of the State of New York or of the United States nor was there a determination as to the validity of a statute. It is respectfully submitted that the Appeal herein should be dismissed with costs.

s/Sydney G. Platzer

Sworn to August 19, 1976.

APPENDIX MM—NOTICE OF CROSS MOTION TO PRECLUDE

COURT OF APPEALS
STATE OF NEW YORK

SHEARSON, HAMMILL & CO., INC.,
Plaintiff-Respondent,

-against-

SAMUEL H. SLOAN d/b/a SAMUEL H. SLOAN & CO.,
Defendant-Appellant.

New York County Clerk's
Index No. 1321/1972

PLEASE TAKE NOTICE that upon the annexed affidavit of SAMUEL H. SLOAN sworn to the 16th day of September, 1976 the undersigned hereby cross moves this Court for an order pursuant to Section 500.9(c) of the Rules of Practice of this Court precluding plaintiff-respondent from filing a brief in this appeal and for such other and further relief as may be just and equitable.

Dated: September 15, 1976

Yours, etc.
s/ Samuel H. Sloan
Samuel H. Sloan
917 Old Trents Ferry Road
Lynchburg, Va. 24503
(804) 384-1207

TO:—

LEIBOWITZ, PLATZER & FINEBERG
Attorneys for Plaintiff-Respondent
299 Broadway
New York, New York 10007
(212) 267-0420

APPENDIX NN—AFFIDAVIT OF SAMUEL H. SLOAN DATED SEPTEMBER 16, 1976 IN SUPPORT OF CROSS MOTION TO PRECLUDE AND IN OPPOSITION TO MOTION TO DISMISS APPEAL

COURT OF APPEALS
STATE OF NEW YORK

SHEARSON, HAMMILL & CO., INC.,
Plaintiff-Respondent,

-against-

SAMUEL H. SLOAN d/b/a SAMUEL H. SLOAN & CO.,
Defendant-Appellant.

SAMUEL H. SLOAN, being duly sworn, deposes and says:

1. This is an appeal from a decision reported as *Shearson, Hammill & Co., Inc. v. Sloan*, 49 A.D. 2d 521, 373 N.Y.S. 2d 849 (First Dept. 1975). My brief was filed in this Court on April 21, 1976. The rules of practice of this Court give the respondent 30 days to file an answering brief. Counsel for respondent did not file an answering brief within 30 days and to this day has not filed an answering brief. Under these circumstances, this Court should preclude him from filing an answering brief. Not only is it unfair and prejudicial to me to be kept waiting for an indefinite period of time to relieve an answering brief, but if this Court fails to preclude this respondent from filing an answering brief, he and other respondents will be encouraged to adopt dalliatory tactics and to disobey court rules in the future.

2. This is not the first time that counsel for respondent has failed to file a brief on time. In fact, from the record established in this case, it would be fair to classify counsel for respondent as a habitual violator of court rules and

orders. Indeed, the fact that this lawsuit, which was commenced on February 2, 1972, is still before the courts is almost entirely the result of delaying tactics on the part of counsel for respondent which have occurred at every stage of the litigation.

3. For example, when this case was pending before the Appellate Division, First Department, I served my appeal brief on December 8, 1974. Subsequently, counsel for respondent called me and stated that he was having difficulty in getting out an answering brief because of other pending litigation. In order to be courteous to him, I signed a stipulation which gave him until May 8, 1975 to file an answering brief. This stipulation was filed in the Appellate Division, First Department, and an order was entered accordingly. However, even this extension of time proved not to be sufficient for counsel for respondent and when May 8, 1975 came, without even calling me to advise that he would not be filing a brief on that date, he moved the Appellate Division via an order to show cause for an extension of time until September, 1975 to file his answering brief. A copy of the notice of motion is attached hereto and marked Exhibit A and can also be found on page 169 of the Appendix to this appeal which I have filed in this Court. On May 29, 1975, the Appellate Division denied this motion. However, rather than preclude counsel for respondent from filing a brief, the Appellate Division, First Department, gave him a further opportunity, until June 6, 1975, to file even though he had disobeyed the prior court order which had given him until May 8, 1975 to file his brief. A copy of the decision and order of the Appellate Division is annexed hereto and marked Exhibit B and can also be found on page 182 of the Appendix I filed in this appeal.

4. Similarly, counsel for respondent adopted delaying tactics at every step when this case was pending before the Supreme Court of the State of New York. These delaying tactics are set forth in detail on pages 10-15 of the brief I

have filed and are discussed at other places in my brief in connection with various arguments I have set forth. In fact, the only times that counsel for respondent has moved expeditiously in this case occurred when he commenced this action by attaching $12,500.00 contained in my bank account, when he obtained a default judgment by failing and refusing to serve me with his petition to confirm an arbitration award and when he used the default judgment to convert the funds held by the Sheriff pursuant to the order of attachment to the benefit of his client. These acts, which I believe were wrongful, demonstrate that my adversary is capable of moving quickly when it is in his interests to do so. Under these circumstances, his willful delay in filing an answering brief in this Court should not be excused.

5. In a recent case, *National Hockey League v. Metropolitan Hockey Club*, ____ U.S. ____, 49 L. Ed 2d 747 (Decided June 3), 1976), the United States Supreme Court, in a related context, held that the severe sanction of the dismissal of an action was proper where counsel had disregarded the rules of court and had failed to respond to interrogatories on time. There, the Supreme Court stated:

> "But here as in most other areas of the law, the most severe in the spectrum of sanctions provided by statute or rule must be available to the District Court in appropriate cases, not merely to penalize those whose conduct may be deemed to warrant such a sanction, but to deter those who might be tempted to such conduct in the absence of such a deterrent. If the decision of the Court of Appeals remained undisturbed in this case, it might well be that *these* respondents would faithfully comply with all future discovery orders entered by the District Court in this case. But other parties to other lawsuits would feel freer than we think Rule 37 contemplates they should feel to flout other discovery orders of other district courts."

6. This is precisely the type of situation involved here. In early June of this year, when it became apparent that my adversary had not filed a brief on time, I called the clerk's office at the State of New York Court of Appeals and asked what my remedies were. I was told by someone in the clerk's office that my remedy was a motion to preclude but that these were "never granted" except without prejudice to the filing of a brief by a date certain. I then telephoned my adversary, Mr. Platzer, and asked when he intended to file his brief. He replied that he would "try to get one out within a week" and that the New York State Court of Appeals was "pretty liberal" about accepting late answering briefs.

7. It is noteworthy that Mr. Ephraim Leibowitz, one of the partners in the law firm of Leibowitz, Platzer & Fineberg, counsel for respondent, writes a monthly column for the New York Law Journal on bankruptcy law and is a noted authority on that subject. Since bankruptcy law is highly technical and is concerned with cut-off dates and deadlines, it is obvious that the law firm of Leibowitz, Platzer & Fineberg is capable of making itself aware of the fact that in an appeal to the State of New York Court of Appeals, the respondent is given 30 days to file an answering brief. Since counsel for respondent clearly knows the rules, it is obvious that he has decided to flout them in view of the fact that several months have passed without an answering brief or a response of any kind being filed in this Court. Under these circumstances, this Court should not fail to grant this motion to preclude.

8. In a notice of motion dated August 19, 1976, which was exactly 120 days after I filed my brief in this Court, counsel for respondent moved to dismiss this appeal. Unfortunately, I was then in Afghanistan and when I returned the U.S. Postal Service experienced difficulty in locating the mail which had been accumulating in my absence and as a result I did not receive the motion papers until the return date of the motion. For this reason, I have

been unable to submit this affidavit in opposition to the motion to dismiss this appeal until now.

9. In this appeal, I filed a jurisdictional statement dated April 15, 1976 along with proof of service on counsel for respondent. Although counsel for respondent was thereby fully appraised of the jurisdictional basis for my appeal, he did not file a motion to dismiss my appeal at that time. Subsequently, I filed a 66-page brief and pages 1-4 of this brief again set forth the jurisdictional basis for this appeal. I also filed a 193-page appendix and a 46-page supplemental appendix. As noted previously, counsel for respondent has yet to file an answering brief although nearly five months have passed since my brief was filed.

10. If counsel for respondent wished to argue that this Court has no jurisdiction to entertain this appeal, he had ample opportunity to do so by filing a brief stating the legal basis for his argument and citing cases decided by this Court which support his position. He has chosen not to do so. Instead, he has filed a notice of motion and a three-page supporting affidavit which cites no cases and makes no references to the record. In addition, counsel for respondent has not filed a memorandum of law. Under these circumstances, if this motion had been filed in the United States District Court for the Southern District of New York, Rule 9 of the Calendar Rules for the Southern District of New York would authorize the automatic denial of this motion.

11. The three-page moving affidavit purports to set forth, in seven numbered paragraphs, the entire course of the proceedings in the New York State Supreme Court and in the Appellate Division, First Department. However, as I pointed out on page 7 of my brief, this appeal brings up for review twenty decisions and orders of various justices of the New York State Supreme Court, followed by the entry of a default judgment, followed in turn by six orders of the Appellate Division, First Department. The entry of all of these orders spanned a period of three and one half years.

The affidavit makes no mention of this fact. From this it is apparent that counsel for respondent is hoping to mislead the Court as to what relevant facts and legal issues are involved in this appeal and is hoping that this Court will dismiss this appeal without ever reading Appellant's Brief and without ever examining the original record of this appeal which has been filed with this Court. I believe that this Court should summarily deny the motion to dismiss this appeal. The appropriate time to decide the jurisdictional question, if a serious jurisdictional question exists, which I doubt, is after oral argument has been heard and after this Court has had the opportunity to become familiar with the facts of this case. If a jurisdictional defect is found in this appeal, this Court can notice it at any time, even if a formal motion to dismiss the appeal is not then before the Court.

12. In any event, the claim that this Court has no jurisdiction to decide this appeal is without merit. For one thing, I am appealing from two orders of the Appellate Division, First Department, the second of which was dated September 11, 1975. In that second order, the Appellate Division, First Department, refused to disqualify Mr. Justice Lupiano from sitting on the panel of judges which reviewed, among other things, the decisions and orders entered in this case by Mr. Justice Lupiano when he was acting as a judge of the New York State Supreme Court, Special Term Part I. It has been established at least since *Graham v. Linden*, 50 N.Y. 549 (1872) that I can take an appeal to the State of New York Court of Appeals as a matter of right under these circumstances. Moreover, in *Van Arsdale v. King*, 152 N.Y. 69 (1897) a circumstance indistinguishable from that of the instant case arose. In its decision there the New York State Court of Appeals stated:

> "It is quite evident that in the General Term Justice Dykman's attention was not called to the fact that he presided at the Special Term at which the original order was made, and that he had

> forgotten that fact. Mistakes of this character are not uncommon. Litigants are, however, entitled to have their appeals heard and determined by a constitutional court, and we would not be justified in depriving them of this right, however innocent the mistake may be.
>
> The order of the General Term should be reversed, and the matter remitted to the Appellate Division, there to be reheard and determined, with costs to abide the event.
>
> All concur.
>
> Ordered accordingly."

13. Since the order of Mr. Justice Lupiano here which denied my motion to vacate the order of attachment is clearly comparable to the order of Mr. Justice Dykman granting leave to sue and since in both cases the judge in question subsequently sat on a panel of the Appellate Division which reviewed his own order, it is obvious that *Van arsdale v. King, supra* establishes not only that an appeal to the Court of Appeals is available as a matter of right but that this Court must reverse the court below and must remand this matter to the Appellate Division, First Department. Moreover, even without this judicial precedent, common sense dictates that if a judge can be permitted to review his own order on appeal, the entire purpose of appellate review is defeated.

14. It should be pointed out that this was all explained on pages 62-65 of the brief I filed in this Court on April 21, 1976. It is thus clear that counsel for respondent has filed a motion to dismiss my appeal in the hope that the judges of this Court will not read my brief. The affidavit in support of the motion to dismiss this appeal ignores the fact that a clear legal question involving a judge who has sat in review of his own order is presented by this appeal. Clearly, the tactics adopted by counsel for respondent should not be permitted to succeed.

15. The affidavit of counsel for respondent contends that although this "action was commenced by the obtaining of an order of attachment," pursuant to a statute the constitutionality of which is challenged in this appeal and was also challenged in "multiple motion attacks" in the court of original jurisdiction and subsequentiy in the appeal to the Appellate Division, First Department, the constitutional question is now "a moot point in that the proceeds of the attachment were used to satisfy a duly entered Judgment in favor of the Plaintiff-Respondent." In essence, the proposition which counsel for respondent is setting forth is that even assuming *arguendo* that I was deprived of my constitutional rights at some stage of this litigation, that fact became moot when a judgment was entered in favor of respondent. This argument is absurd. Obviously, if a judgment had not been entered in favor of respondent, I would not be appealing. It is clear from CPLR 5601 that no appeal may be taken to the State of New York Court of Appeals as of right except from a judgment or order "which finally determines an action." In this case, my appeal challenges, among other things, the constitutionality of the New York State attachment statute. Counsel for respondent makes it clear in his affidavit that this action was commenced by the obtaining of an order of attachment and that I challenged the constitutional validity of this order of attachment in both the court of original jurisdiction and in an appeal to the Appellate Division, First Department. Since under no circumstances could there be an appeal as of right to the State of New York Court of Appeals either from an order of attachment or from an order refusing to vacate or modify an order of attachment, it is clear that the question of the constitutionality of the New York State attachment statute could not come up in a case presented to this Court unless that case had proceeded to a final judgment in favor of the party who obtained the order of attachment. What counsel for respondent is suggesting here is that the entry of a final judgment in an action which was commenced by the obtaining of an order of attachment through which the court acquired jurisdiction in the first instance, renders moot the question of whether the order of attachment was valid. If this argument is correct, the State of New York Court of Appeals can never have jurisdiction to decide whether an order of attachment was valid in a particular case. However, it is clear that this argument is not correct for a number of obvious reasons. For one, CPLR 5501(a) provides that "an appeal from final judgment brings up for review . . . any non-final judgment or order . . ." Clearly, an order of attachment is a non-final judgment or order and therefore is properly reviewed on appeal from a final judgment or order. I would like to point out that again my brief discusses this point in detail on pages 27-29 thereof and it is obvious that the reason counsel for respondent has filed a motion to dismiss this appeal and has not filed an answering brief is that counsel for respondent is hoping that this Court will dismiss my appeal without ever reading my brief. It is also appropriate to state that in *North Georgia Fishing Co. v. Di-Chem.* 419 U.S. 601 (1975) the United States Supreme Court declared that a Georgia attachment statute which was applied in a matter identical to the attachment statute I am challenging in this appeal was unconstitutional. From this it is apparent that not only is my appeal properly before this Court but that on the merits of my appeal I must prevail.

16. I should also say that in *Carey v. Sugar,* ____ U.S. ____, 44 U.S. L.W. 4416 (decided March 24, 1976) the United States Supreme Court held that the federal courts must abstain from deciding whether the New York State attachment is constitutional until the state courts have had the opportunity to pass on this issue. In a subsequent decision, *Bellotti v. Baird,* ____ U.S. ____, 49 L. Ed. 2d 844 (decided July 1, 1976) the United States Supreme Court explained the abstention doctrine by stating that the highest court of the state must have had the opportunity to rule on the constitutional question before it can be passed

upon by the federal courts and by the United States Supreme Court. However, as I pointed out previously, if counsel for respondent succeeds in his argument that this appeal should be dismissed, it will be impossible for the State of New York Court of Appeals ever to pass upon the question of the constitutionality of the clearly unconstitutional New York State attachment statute. This result should not be permitted.

17. I would also like to point out that the affidavit in support of the motion to dismiss this appeal states that a judgment was "duly entered." However, on pages 29-36 of my brief I demonstrate that this was not the case. In addition to citing a variety of irregularities in the judgment itself and in the manner in which it was entered, I demonstrate in my brief that under the principle set forth in *McNulty v. Solley*, 94 N.Y. 242 (1884), which is presently incorporated in CPLR 3211(a)(5), a final judgment could not have been entered in this action and indeed this action must be dismissed. Counsel for respondent places great emphasis on the fact that this case involves a decision by arbitrators and urged when this case was argued before the Appellate Division that the fact that an arbitration hearing took place before the New York Stock Exchange renders all of the procedural irregularities which occurred to be of no moment. However, one of the arguments which I presented in my brief to the Appellate Division and which I again present in the brief I have filed here is that the New York Stock Exchange improperly awarded on a claim for counsel fees. My argument is in accord with the recent decision of this Court in *Joan Garrity v. Lyle Stuart, Inc.*, No. 293 (Decided July 6, 1976). There this Court held that an arbitrator lacks the power to award punitive damages. Punitive damages are closely akin to counsel fees in that they can only be awarded in cases involving vexatious litigation practices or other wrongs. See generally *Alyeska Pipeline Service v. Wilderness Society*, 421 U.S. 240 (1975). Accordingly, it is

obvious that if an arbitrator cannot award punitive damages he cannot award counsel fees either unless the contract or the arbitration agreement so specifies which is not the case here. I realize that if this case involved solely this issue and none other, I could not appeal to the Court of Appeals without permission. However, here counsel for respondent has suggested that a constitutional question has become "moot" because of a decision by arbitrators (which, incidentally, was not an "arbitration award" in the usual form) and I submit that if it can be demonstrated that the arbitrators acted without authority, the argument of counsel for respondent must fail.

18. I would also like to point out that one of the arguments in my brief to this Court is that the New York State courts lack jurisdiction to confirm an award by New York Stock Exchange arbitrators since "exclusive jurisdiction" is conferred upon the federal courts by Section 27 of the Securities Exchange Act of 1934, 15 U.S.C. 78aa. I also argue that there were a number of jurisdictional defects in the entry of the judgment. All of these arguments and several others are set forth in detail in my brief. It is obvious that these arguments are so clearly correct that counsel for respondent does not want to file a brief in response since there is no valid response possible and consequently counsel for respondent has filed a frivolous motion to dismiss this appeal. It is also clear if a jurisdicitional defect exists in the entry of the judgment, the judgment was not "duly entered" and the assertion by counsel for respondent of the "mootness" of the constitutional questions involved in this appeal is without merit.

19. Finally, it should be said that the affidavit in support of the motion to dismiss this appeal is without merit.

19. Finally, it should be said that the affidavit in support of the motion to dismiss this appeal makes a number of factual misstatements in addition to those which have already been pointed out. For example, paragraph 7 of this

affidavit speaks of the opinion of the Appellate Division and states that this opinion did not determine the validity of the New York State attachment statutes because "the question was never reached nor was a determination of same required." However, the fact is that the Appellate Division did not render an opinion of any kind. Therefore, the affidavit which has been filed by counsel for respondent contains untrue statements and the explanation of why the Appellate Division did what it did is based upon nothing more than pure speculation. The affidavit of counsel for respondent contains other factual misstatements as well. However, I believe it would be inappropriate for me to set forth them in detail since this Appellate Court should base any decision it makes, not on affidavits filed in this Court which state the version of each party as to what took place in the courts below, but on the documents which make up the record of this appeal.

20. For all of the foregoing reasons, the motion to dismiss this appeal should be denied and this cross-motion to preclude counsel for respondent from filing a brief should be granted.

WHEREFORE, I respectfully pray that this Court deny the motion to dismiss this appeal and that this Court grant this motion to preclude counsel for plaintiff-respondent from filing an answering brief and for such other and further relief as may be just and equitable.

s/ Samuel H. Sloan
SAMUEL H. SLOAN

Sworn to before me this
16th day of September, 1976
s/ Fred Gessner
FRED GESSNER
Notary Public, State of New York
No. 52-1416215
Qualified in Suffolk County
Term Expires March 30, 1977 .

EXHIBIT A—NOTICE OF MOTION

APPELLATE DIVISION OF THE SUPREME COURT
FIRST DEPARTMENT

SHEARSON, HAMMILL & CO., INC.,
Plaintiff-Respondent,

-against-

SAMUEL H. SLOAN, d/b/a SAMUEL H. SLOAN & CO.,
Defendant-Appellant.

S I R S:

PLEASE TAKE NOTICE, that upon the annexed Affirmation of SYDNEY G. PLATZER, affirmed the 8th day of May, 1975, and all the papers filed herein, the undersigned will move this Court on the 23rd day of May, 1975, for an Order adjourning the appeal in the instant matter to the September 1975 Term of this Court.

DATED: NEW YORK, N.y.
MAY 8, 1975.

Yours, etc.,
LEIBOWITZ, PLATZER & FINEBERG
Attorneys for Plaintiff-Respondent
Office & P.O. Address:
299 Broadway
New York, N.Y. 10007
Tel. #(212) 267-0420

TO:
SAMUEL H. SLOAN
Defendant-Appellant Pro Se
917 Old Trents Ferry Road
Lynchburg, Virginia 24503

EXHIBIT B—ORDER

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department of the County of New York, on May 29, 1975

Present—Hon. Harold A. Stevens, Presiding Justice,
Arthur Markewich,
Theodore R. Kupferman,
Myles J. Lane,
Emilio Nunez, Justices.

Shearson, Hammill & Co., Inc.,
Plaintiff-Respondent,

-against-

Samuel H. Sloan, d/b/a Samuel H. Sloan & Co.,
Defendant-Appellant.

M-1243

The above-named plaintiff-respondent having moved this Court for an order adjourning argument of the appeal taken by defendant-appellant from the order and judgment of the Supreme Court, New York County, entered on October 2, 1974, to the September 1975 Term,

Now, upon reading and filing the notice of motion, with proof of due service thereof, and the statements of Sydney G. Platzer in support of said motion and the affidavit of Samuel H. Sloan in opposition thereto, and after hearing Mr. Sydney G. Platzer for the motion and Mr. Samuel H. Sloan, appearing pro se, opposed,

It is ordered that said motion be and the same hereby is denied. Respondent's points are to be served and filed on or before June 6, 1975 and reply points, if any, to be served

and filed on or before June 17, 1975, with argument of the appeal to be heard on June 24, 1975 at 10:00 A.M. The stay, dated May 8, 1975, affixed to the notice of motion is vacated.

ENTER:
Clerk.

APPENDIX OO—ORDER OF STATE OF NEW YORK COURT OF APPEALS DATED SEPTEMBER 21, 1976 DISMISSING APPEAL

Mo. No. 917
Shearson, Hammill & Co., Inc.,
Respondent,
vs.
Samuel H. Sloan, d/b/a Samuel H. Sloan & Co.,
Appellant.

(A) Motion to dismiss the appeal herein granted, the appeal from the July 3, 1975 order of hthe Appellate Division dismissed upon the ground that no substantial constitutional question is directly involved, and the appeal from the September 11, 1975 order of the Appellate Division dismissed upon the ground that the order does not finally determine the action within the meaning of the Constitution, with costs and twenty dollars costs of motion. (B(Cross-motion to preclude respondent's brief dismissed as academic.

APPENDIX PP—NOTICE OF APPEAL TO UNITED STATES SUPREME COURT AND AFFIDAVIT OF SERVICE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

SHEARSON, HAMMILL & CO., INC.,
PLAINTIFF-RESPONDENT

-against-

SAMUEL H. SLOAN d/b/a SAMUEL H. SLOAN & CO.
DEFENDANT-APPELLANT

INDEX NO. 1321/1972

PLEASE TAKE NOTICE that the above named defendant-appellant hereby appeals to the United States Supreme Court from all parts of the order of the State of New York Court of Appeals dated September 21, 1976 which dismissed the appeal in this action from orders of the Supreme Court of the State of New York, Appellate Division, First Department with the statement that no substantial constitutional question is directly involved in this appeal and from the orders of the Supreme Court of the State of New York, Appellate Division, First Department dated July 3, 1975 and September 11, 1975 which affirmed the default judgment of the Supreme court of the State of New York, New York County and denied the motion for reconsideration and for a disqualification of one of the judges who heard the appeal.

Dated: October 20, 1976

Yours, etc.
s/ Samuel H. Sloan
Samuel H. Sloan
Defendant-Appellant, pro se
917 Old Trent's Ferry Rd.
Lynchburg, Virginia 24503
(804) 384-1207

To: LEIBOWITZ, PLATZER & FINEBERG
Attorneys for Plaintiff-Respondent
299 Broadway
New York, N.Y. 10007

Attorney General of the State of New York
The Capitol
Albany, N.Y. 12207

ANDA BAUMANIS, being duly sworn, deposes and says that she is not a party to this action, is over 21 years of age, and resides at 243 West 99th Street, New York, New York 10025; and that on October 20, 1976 she served the within notice of appeal by mailing a true copy of same to:

Leibowitz, Platzer & Fineberg,
Attorneys for Plaintiff-Respondent
299 Broadway
New York, New York 10007

Louis K. Lefkowitz,
Attorney General of the State of New York
The Capitol
Albany, New York 12207

s/ Anda Baumanis
ANDA BAUMANIS

STATE OF NEW YORK SS:
COUNTY OF NEW YORK

Sworn to before me this
21 day of October 1976
s/ Harry Telfus
HARRY TELFUS
Notary Public, State of New York
No. 31-3948500
Qualified in New York County
Commission Expires March 30, 1977

Supreme Court, U. S.
FILED
APR 1 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1976
No. 76-893

SAMUEL H. SLOAN d/b/a SAMUEL H. SLOAN & CO.,

Defendant-Appellant,

-against-

SHEARSON, HAMMILL & CO., INC.,

Plaintiff-Appellee.

ON APPEAL FROM THE NEW YORK STATE COURT OF APPEALS

MOTION OF APPELLEE TO DISMISS OR AFFIRM

LEIBOWITZ, PLATZER & FINEBERG
Attorneys for Appellee
1500 Broadway
New York, New York 10036
(212) 730-1144

SYDNEY G. PLATZER
Of Counsel

HENRY G. SWERGOLD
Legal Assistant

(6214)

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1976
No. 76-893

SAMUEL H. SLOAN d/b/a SAMUEL H. SLOAN & CO.,

Appellant,

-against-

SHEARSON, HAMMILL & CO., INC.,

Appellee.

ON APPEAL FROM THE NEW YORK STATE COURT OF APPEALS

MOTION OF APPELLEE TO DISMISS OR AFFIRM

The Appellee moves this Court to dismiss the appeal herein or, in the

alternative, to affirm the judgment of the Court of Appeals of the State of New York on the grounds that said appeal does not present a substantial Federal question, is not in conformity with 28 U.S.C. 1257(2), and the issues herein are moot.

I. THE APPEAL IS NOT WITHIN THE JURISDICTION OF THIS COURT.

Appellant expressly relies on 28 U.S.C. 1257(2) as the jurisdictional basis for this appeal "inasmuch as the State of New York Court of Appeals has decided in this case the question of the constitutional validity of the New York Attachment Statute, Article 62 of the New York Civil Practice Law & Rules, and the decision in its favor". (Jurisdictional Statement p.2)

It is well settled law that review by the Supreme Court is precluded unless it is shown that the state court actually decided the federal question, and that the decision of the federal question was necessary to the state court's determination of the cause. Chouteau vs. Gibson, 111 U.S. 200, 43 S.Ct. 340, 28 L.Ed. 400 (1883); First Nat. Bank vs. Estherville, 215 U.S. 341, 30 S.Ct. 152, 54 L.Ed. 223 (1910); Whitney vs. People of the State of California, 274 U.S. 357, 47 S.Ct. 641, 71 L.Ed. 1095 (1926); Honeyman vs. Hanan, 300 U.S. 14, 57 S.Ct. 350, 81 L.Ed. 476 (1936).

The New York Court of Appeals in deciding this case below said:

> "Motion to dismiss the appeal herein granted...on the ground that no substantial federal

question is directly involved." (40 N.Y.2d 844, Jurisdictional Statement p.146a)

From the Court's language it is clear, despite Appellant's attempt to distort the meaning of the word "substantial" (Jurisdictional Statement p.24), that the Court did not reach the issue of the constitutionality of the New York Attachment Statute. The decision was on a motion to dismiss, in which the Appellee herein did not even argue the constitutionality of the Statute. Clearly if the Court wished to decide the constitutional question, it would have denied the motion and allowed Appellee to submit a brief on the constitutional question.

Therefore, since the highest court of the State of New York did not

decide the constitutionality of the New York Statute herein, it is respectfully submitted that this Court has no jurisdiction in this appeal. 28 U.S.C. 1257(2)

II. THE ISSUES PRESENTED HEREIN ARE MOOT.

The action herein was commenced by the obtaining of an order of attachment pursuant to Article 62 of the New York Civil Practice Law & Rules. Subsequent to the obtaining of the order of attachment, Appellant, on his own initiative, moved for an order to compel arbitration. This motion was granted and the parties proceeded to arbitrate the dispute. A decision and award was granted to Appellee herein. Thereafter, judgment was entered

upon the award in the arbitration proceeding.

The Appellant had a hearing in the arbitration proceeding and an opportunity to attack the confirmation of the award. The question of the validity of the attachment is a moot point in that the proceeds of the attachment were used to satisfy a duly entered judgment in favor of Appellee. Whether a separate action would have been commenced for the confirmation of the award of whether the confirmation took place in the then existing stayed action wherein the attachment was granted, had no material effect upon the outcome of the litigation. The Appellant had his day in court on all the issues, and the validity of the New York Attachment Statute is

irrelevant in this case.

This case is, therefore, moot; there is no controversy between the parties of "sufficient immediacy and reality" to justify review by this Court. Golden vs. Zwickler, 394 U.S. 103, 109, 89 S.Ct. 956, 22 L.Ed.2d 111. See also Kimball vs. Kimball, 174 U.S. 158, 161, 19 S.Ct. 639, 43 L.Ed. 932 (1899); Maryland Casualty Co. vs. Pacific Coal & Oil Co., 312 U.S. 270, 273, 61 S.Ct. 510, 85 L.Ed. 826.

Appellant tries to escape the fact that the issues he raises are moot by asserting that "[I]f the order of attachment were declared invalid Sloan would be entitled to recover at a minimum the poundage of $625." (Jurisdictional Statement p.25) The Court should note

that the poundage fee for the Sheriff is the same for "collecting money by virtue of an execution" and by virtue of "an order of attachment". (New York Civil Practice Law & Rules §8012(b)(1). Thus, Appellant is not entitled to receive even this in return if the Attachment Statute is declared unconstitutional. The judgment Appellee received upon the confirmation of the arbitration award was clearly a valid judgment. Neither Appellee nor the Sheriff receive a dollar amount in excess of the amount permitted had there been no attachment.

III. THE QUESTION SOUGHT TO BE REVIEWED WAS NOT TIMELY RAISED.

Appellant herein is attempting to

get "two bites of the apple". After the lower courts of the State of New York denied Appellant's motion to vacate the attachment, the parties proceeded to arbitration. As noted above, the arbitrators awarded a decision to the Appellee upon which a judgment was later entered. Aggrieved with this result, Appellant then chose to appeal to the Supreme Court, Appellate Division of New York. Appellant now claims (Jurisdictional Statement p.26) that he raised the constitutional question "at the very earliest opportunity".

This statement is clearly false. New York Civil Practice Law & Rules §5701(a)(2)(i) provides:

> (a) An appeal may be taken to the Appellate Division as of

right...

(2) ...where the motion is decided...

(i) grants, refuses, continues or modifies a provisional remedy.

This clearly gives the right to appeal to an aggrieved party once the motion to vacate an attachment is decided.

Appellant claims he had the right to rely on the case of Richmond vs. Richmond, 41 A.D.2d 933, 344 N.Y.S.2d 52, 54 (Third Dept. 1973) which he interprets to mean that an appeal from an order denying a motion to vacate was not the proper proceeding in which to attack the consitutionality of the statute. The Appellant has misunderstood this case. That court refused to decide the constitutional issues because

"there are other avenues open to this court for a proper disposition of the appeal". Richmond vs. Richmond, supra. It is well settled law that a court will not decide the constitutional issues if there are other grounds upon which the case may be disposed of. Rescue Army vs. Municiple Court of the City of Los Angeles, 331 U.S. 549, 67 S.Ct. 1409, 91 L.Ed. 1666 (1947).

Clearly, the Court in deciding the Richmond case was using this principle. In AMF Inc. vs. Alfo, 48 A.D.2d 352, 369 N.Y.S.2d 460 (Second Dept. 1975), the court accepted and decided an appeal based on constitutional issues from an order which denied a motion to vacate an attachment.

Furthermore, New York Civil

Practice Law & Rules §5602(b)(1) provides that non-final orders of the Appellate Division can be appealed by permission of the Court.

Thus, the Appellant could and should have appealed the decision of the lower court denying Appellant's motion to vacate the order of attachment. He did not, and instead chose to await the determination of the arbitrators. Only when the arbitrators decided in Appellee's favor and that decision was confirmed, did Appellant decide to appeal.

IV. NO SUBSTANTIAL FEDERAL QUESTION IS PRESENTED.

Appellant attempts to raise other alleged federal questions. None of these

have any merit, and would have no effect on the outcome of this litigation. The arguments discussed above clearly should dispose of this appeal. As the Court of Appeals pointed out, "no substantial federal question is directly involved" in this law suit. (Sloan vs. Shearson, Hammill & Co., Inc., 40 N.Y.2d 844, Jurisdictional Statement p.146a)

CONCLUSION

WHEREFORE, Appellee respectfully moves this Court to dismiss this appeal or, in the alternative, to affirm the judgment entered by the Court of Appeals of the State of New York.

LEIBOWITZ, PLATZER & FINEBERG
Attorneys for Appellee